U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 December 2005

Case No.: 2004-LHC-2355

OWCP No.: 08-121727

IN THE MATTER OF:

EDUARDO GONZALEZ,
Claimant

vs.

RENDA MARINE, INC.,
Employer

and

TEXAS MUTUAL INSURANCE COMPANY,
Carrier

APPEARANCES:

HARRY C. ARTHUR, ESQ.,
On Behalf of the Claimant

PETER THOMPSON, ESQ. and
CHRISTOPHER E. KLAWINSKI, ESQ.,
On Behalf of the Employer/Carrier

Before: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 et seq., brought by Eduardo Gonzalez (Claimant) against Renda Marine, Inc. (Employer) and Texas Mutual Insurance Company (Carrier).[1]

[1] For simplicity both Employer and Carrier are collectively referred to herein as Employer.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 31 May 2005, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[2]

Witness Testimony of
Claimant
Arturo Rodriguez
Diane B. Hacker
Mark Sanders, M.D.

Exhibits
Claimant's Exhibits (CX) 1-19,[3] 21-29, 31[4]-34.
Employer Exhibits (EX) 1-18, 20-29.[5]

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[6]

The parties stipulate and I find as fact:

1. There is jurisdiction under the Act.
2. An employee-employer relationship existed at the time of the alleged accident/injury.
3. Employer was properly notified of the accident/injury.
4. Disability benefits have not been paid.
5. An informal conference was held on 14 January 2003.

[2] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[3] CX-19 was admitted for the limited purpose of showing an informal conference took place and the date that the L-203 was submitted.
[4] The record was held open for Employer's doctor to review the EMG and Nerve Conduction Velocity Study completed after the close of discovery and determine whether Claimant had cubital tunnel syndrome. Employer has not submitted additional reports from its doctor.
[5] Claimant objected to EX-23, the oral deposition of Mr. Cavazos because it was not a complete transcript. The objection was sustained.
[6] Joint Exhibit-1 (JX).

ISSUES

The unresolved issues presented by the parties are:

1. Whether Claimant suffered a compensable injury.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement (MMI).
4. Entitlement to and authorization for medical care and services – including the reasonableness and necessity of recommended surgery.
5. Claimant's average weekly wage.
6. Attorney's fees, penalties, and interest.

FACTUAL BACKGROUND

The basic facts of this case are not complex.

Claimant came to the United States in 1994. Claimant was a welder or welder's helper for Employer when a come-along he was using to move a pipe shifted and allegedly hit him on 8 June 2001. Claimant continued working the rest of that day. When he returned to work on Monday, 11 June 2001, he told his captain he did not feel well. The parties dispute as to whether he advised the captain about his work injury. Employer has provided very little medical treatment and no disability compensation. Claimant stopped working on 18 June 2001, because Employer advised him he needed a return-to-work note from a doctor, but the clinic refused to see him without a letter from Employer. Claimant eventually returned to work for a different employer in February 2003.

POSITIONS OF THE PARTIES

Claimant contends he was injured at work on 8 June 2001 and was temporarily totally disabled from 18 June 2001 until February 2003, when he returned to suitable alternative employment (SAE). He also contends that he has not reached MMI because he still needs surgery, which could potentially improve his condition and reduce his pain. In addition, Claimant maintains that all of his medical treatment related to his 8 June 2001 work injury was reasonable and necessary, and therefore compensable under the Act. He also asserts that the recommended surgery is reasonable, necessary and related to his work injury. He further maintains that when he returned to SAE as a painter, he made less money than when he worked for Employer as a welder. Finally, Claimant contends that his average weekly wage should be determined under Section 10(c) and is $834.39, based on his actual wages for 28 weeks.

Employer, on the other hand, questions the circumstances surrounding Claimant's alleged injury. Employer emphasizes that another welder working ten feet from Claimant saw no indication of any kind of injury. Employer also points out that Claimant continued working for four more hours after his alleged injury and never made a report to Employer. In addition, when Claimant finally sought treatment, he denied a job injury as the cause of his pain. Employer also contends that if Claimant does have cubital tunnel syndrome, it could not have been caused by the injury he described. Therefore, Employer asserts that it is not obligated to reimburse Claimant for past medical care or to provide him with future medical care. Finally, Employer maintains Claimant's average weekly wage is $762.12.

Alternatively, Employer contends Claimant, at most, suffered a soft tissue injury to his upper extremity that resolved within six to twelve weeks and he could have returned to work at full capacity no later than late August or early September 2001.

LAW

Disability Compensation

It has been consistently held that the Act must be construed liberally in favor of the Claimant.[7] However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[8] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[9]

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.[10]

[7] Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).
[8] 5 U.S.C. § 556(d).
[9] Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct 2251 (1994), aff'g 900 F.2d 730 (3rd Cir. 1993).
[10] Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment."[11] In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.[12] The presumption takes effect once the claimant establishes a **prima facie** case by proving that she suffered some harm or pain and that a work related condition or accident occurred, which could have caused the harm.[13]

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain.[14] These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation.[15]

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption.[16]

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions.[17] "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.[18] Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).[19] The testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption.[20]

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[11] 33 U.S.C. § 902(2).
[12] 33 U.S.C. § 920(a).
[13] Gooden v. Director, OWCP, 135 F.3d 1066 (5th Cir. 1998).
[14] Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).
[15] Id.
[16] See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).
[17] See Gooden, 135 F.3d 1066; Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1082 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976); Conoco, Inc. v. Director [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).
[18] Avondale Industries v. Pulliam, 137 F.3d 326,328 (5th Cir. 1988); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").
[19] See Smith v. Sealand Terminal, 14 BRBS 844 (1982).
[20] See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.[21] If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.[22] The presumption does not apply, however, to the issue of whether a physical harm or injury occurred[23] and does not aid the claimant in establishing the nature and extent of disability.[24]

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain.[25] A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition.[26] Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does.[27] It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily injury.[28]

The opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances.[29]

Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.[30]

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[21] Noble Drilling Co. v. Drake, 795 F.2d 478 (5th Cir. 1986).

[22] Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994).

[23] Devine v. Atlantic Container Lines, G.I.F., 25 BRBS 15 (1990).

[24] Holton v. Independent Stevedoring Co., 14 BRBS 441 (1981); Duncan v. Bethlehem Steel Corp., 12 BRBS 112 (1979).

[25] Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

[26] See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981).

[27] Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982).

[28] Britton, 377 F.2d at 147-148.

[29] Black & Decker Disability Planv. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

[30] 33 U.S.C. § 907(a).

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant's work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.[31] Medical care must also be appropriate for the injury.[32]

A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[33]

Section 7 does not require than an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.[34] Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury.[35]

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect, or refusal.[36] Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury.[37]

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment.[38] Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care.[39] Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care.[40]

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[31] Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979).
[32] 20 C.F.R. § 702.402.
[33] Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).
[34] Ballesteros, 20 BRBS at 187.
[35] Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).
[36] Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977).
[37] Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).
[38] See generally, 33 U.S.C. § 907(d)(1)(A).
[39] Mattox .v Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982).
[40] Id.

Maximum Medical Improvement

The traditional (albeit not exclusive) method for determining whether an injury is permanent or temporary is the date of maximum medical improvement.[41] The date of maximum medical improvement is a question of fact based upon the medical evidence of record.[42] An employee reaches maximum medical improvement when his condition becomes stabilized.[43]

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[44] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[45] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[46] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.[47] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[48] Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.[49]

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[41] See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n. 5 (1985); Trask, 17 BRBS 56; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989).

[42] Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

[43] Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Ltd., 14 BRBS 395, 401 (1981).

[44] Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

[45] 33 U.S.C. § 902(10).

[46] Sproull v. Stevedoring Services of America, 25 BRBS 100, 110 (1991).

[47] Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968) (per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996).

[48] Trask, 17 BRBS at 60.

[49] Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services, 86 F.3d at 443.

The question of extent of disability is an economic as well as a medical concept.[50] To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[51]

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.[52] Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment.[53] Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?[54]

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."[55] Employers may meet their burden by first introducing evidence of suitable alternate employment at the hearing,[56] even though such evidence may be suspect and found to be not creditable.[57]

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[50] Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991).
[51] Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Ass'n v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).
[52] Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988).
[53] New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981).
[54] Id. at 1042.
[55] P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).
[56] Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236-37 n.7 (1985)
[57] Diamond M Drilling Co., 577 F.2d at 1007 n.5

The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish the claimant is physically and mentally capable of performing the work and that it is realistically available.[58] The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record.[59] A showing of only one job opportunity may suffice under appropriate circumstances.[60] Conversely, a showing of one unskilled job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.[61] Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work."[62]

A showing of available suitable alternative employment may not be applied retroactively to the date the injured employee reached MMI. An injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available.[63] MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis."[64] "[I]t is the worker's inability to earn wages and the absence of alternative work that renders [him] totally disabled, not merely the degree of physical impairment."[65]

An employer can show suitable alternative employment by offering the claimant a job in its facility.[66] However, such a job must be a "substantial" one, not designed for the primary benefit of the employee. The job cannot be "sheltered employment." An employer-provided job or "sheltered employment" will not establish suitable alternative employment if it is a job for which the employee is paid even if he cannot do the work or the job is unnecessary to the employer's operations and was created merely to place claimant on the payroll.[67] If the employer-provided position is not "sheltered employment," the employer has satisfied the requirement to show suitable alternative employment.

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[58] Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Co., 21 BRBS 94, 97 (1988).
[59] Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally, Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997).
[60] P & M Crane Co., 930 F.2d at 430.
[61] Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430.
[62] Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).
[63] Rinaldi, 25 BRBS at 131.
[64] Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991)
[65] Id.
[66] Darby v. Ingalls Shipbuilding, Inc., 99 F. 3d 685 (5th Cir. 1996); Darden v. Newport News Shipbuilding , 18 BRBS 224 (1986)
[67] Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980).

Any time an employer offers a claimant light duty work because of physical or mental inability to perform usual work duties, that light duty is tailored to the employee's physical limitations.[68] If the light duty is within a claimant's restrictions, then employer meets its burden of establishing suitable alternative employment.[69] Claimant cannot abandon work and then claim employer did not provide suitable alternative employment.[70]

To qualify as suitable alternative employment, the employer-offered job may be different than the original one and may involve light duties to accommodate the employee's injury.[71] The job may even be specifically tailored for the employee.[72] However, an offered job that is too physically demanding for the claimant to perform is not suitable alternate employment.[73] To qualify as suitable alternative employment, the job must accommodate all working conditions required by all physicians of record.[74]

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,[75] which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.[76]

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.[77] Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.[78] But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate.[79]

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[68] Bryan v. Global Associates, 1996 WL 454719 (DOL O.A.L.J.).
[69] Id.
[70] Id.; see also generally, Darden, 18 BRBS 224.
[71] Walker v. Sun Shipbuilding, 19 BRBS 171 (1986)
[72] Darden, 18 BRBS at 224
[73] Mason v. Bender Welding & Mach. Co., 16 BRBS 307 (1984)
[74] Crum v. General Adjustment Bureau, 738 F.2d 474 (D.C. Cir. 1984), rev'g in pertinent part 16 BRBS 101 (1983). See also Poole v. National Steel & Shipbuilding Co., 11 BRBS 390 (1979) (job meeting only one restriction is not suitable alternate employment); Jameson v. Marine Terminals, 10 BRBS 194 (1979) (offering to try employee in job not meeting medical restrictions is not suitable alternate employment).
[75] 33 U.S.C. § 910(a)-(c).
[76] SGS Control Services, 86 F.3d at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).
[77] 33 U.S.C. § 910(a).
[78] 33 U.S.C. § 910(b).
[79] Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

A worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings if a calculation based on the wages at the employment where he was injured would best adequately reflect a claimant's earning capacity at the time of the injury.[80]

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.[81]

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c).[82] The objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.[83] Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.[84] In calculating annual earning capacity under subsection 10(c), the Administrative Law Judge may consider: the actual earnings of the claimant at the time of injury,[85] the earnings of other employees of the same or similar class of

[80] Miranda v. Excavation Construction, Inc.,13 BRBS 882 (1981).
[81] 33 U.S.C. § 910(c).
[82] Hayes v. P & M Crane Co., 930 F.2d 424 (5th Cir. 1991); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981).
[83] See Barber, 3 BRBS 244.
[84] Gatlin, 935 F.2d at 822.
[85] 33 U.S.C. § 910(c); Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990), vac'd in part on other grounds, 24 BRBS 116 (CRT) (5th Cir. 1991); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 344-45 (1988).

employment,[86] claimant's earning capacity over a period of years prior to the injury,[87] multiply claimant's wage rate by a time variable,[88] all other sources of income,[89] overtime,[90] vacation and holiday pay,[91] probable future earnings of claimant,[92] or any fair and reasonable representation of the claimant's wage-earning capacity.[93]

Under subsection 10(c), the Administrative Law Judge must arrive at a figure which approximates an entire year of work (the average annual earnings).[94]

Penalties

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In order to controvert the right to compensation, the employer must file a notice on or before the 14th day after it has knowledge of the alleged injury or death or is given notice.[95] The employer must file on or within the 14th day after it has knowledge of the injury, not knowledge of the claim.[96] Where the employer fails to file a notice of

[86] 33 U.S.C. § 910(c); Palacios v. Campbell Indus., 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); Hayes, 23 BRBS at 393.
[87] Konda v. Bethlehem Steel Corp., 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).
[88] Lozupone v. Stephano Lozupone & Sons, 14 BRBS 462, 465 (1981); Cummins v. Todd Shipyards Corp., 12 BRBS 283, 287 (1980). (if this method is used, must be one which reasonably represents the amount of work which normally would have been available to the claimant. Matthews v. Mid-States Stevedoring Corp., 11 BRBS 509, 513 (1979)).
[89] Harper v. Office Movers/E.I. Kane, 19 BRBS 128, 130 (1986); Wise v. Horace Allen Excavating Co., 7 BRBS 1052, 1057 (1978).
[90] Bury v. Joseph Smith & Sons, 13 BRBS 694, 698 (1981); Ward v. General Dynamics Corp., 9 BRBS 569 (1978).
[91] Sproull v. Stevedoring Servs. of America, 25 BRBS 100 (1991).
[92] Walker v. Washington Metro. Area Transit Auth., 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987); Palacios v. Campbell Indus., 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); Gilliam v. Addison Crane Co., 21 BRBS 91, 93 (1987).
[93] See generally, Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP, 219 F.3d 426 (5th Cir. 2000).
[94] Wayland v. Moore Dry Dock, 25 BRBS 53, 59 (1991); Brien v. Precision Valve/Bayley Marine, 23 BRBS 207, 211 (1990).
[95] See Spencer v. Baker Agric. Co., 16 BRBS 205, 209 (1984).
[96] See Jaros v. National Steel Shipbuilding Co., 21 BRBS 26, 32 (1988); Spencer, 16 BRBS at 209; Wall v. Huey Wall, Inc., 16 BRBS 340,343 (1984); Miller v. Prolerized New England Co., 14 BRBS 811, 821 (1981); Davonport v. Apex Decorating Co., 13 BRBS 1029, 1041 (1981); Huneycutt v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 142 (1985).

controversion, its liability under 14(e) terminates when the Department of Labor "knew of the facts that a proper notice would have revealed."[97] Therefore, where an employer fails to file a timely notice of controversion it has 28 days from the date of knowledge within which to pay compensation without incurring liability under 14(e).

INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments.[98] The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount compensation due.[99] The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961.[100] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

EVIDENCE AND ANALYSIS

Testimonial and Medical Evidence

Eduardo Gonzalez Estrada, Claimant, testified at trial that:[101]

He lives with his parents, his wife, Maria Lucia Perez and his two minor daughters, in Houston, Texas. His father used to work for Employer, but is retired. His brother still works for Employer.

He was born in Matehuala, San Luis Potosi, Mexico, on 19 June 1970. He came to the United States in 1994 and has lived here continuously since then. He has a resident alien card. He went to preparatory school in Mexico, which is similar to the United States' high school program. He completed about ten (10) or eleven (11) years of preparatory, but did not complete the preparatory program.

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[97] National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1295 (9th Cir. 1979); Hearndon v. Ingalls Shipbuilding Inc., 26 BRBS 17, 20 (1992) (DOL knew of facts that proper notice would have revealed when case was referred to OALJ for formal hearing).

[98] Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974).

[99] Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979).

[100] Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

[101] Tr. 119-190. Claimant's testimony was offered through certified and sworn interpreter, Linda Armendariz Hernandez.

In technical preparatory school he studied to be an automotive technician. He attended the technical preparatory school for about two years. The school only had classes in mathematics, but had material that was taught in English. There were no actual English classes.[102] He denied advising his Jones Act attorney that he took one and one-half years of English at the preparatory school. He could not "say that [he] was taking the course because it's the sort of course that one goes to once a week." He did not recall being asked whether he took any language classes or his response that he took an English class for one and one-half years. He explained that English was a subject that one takes along with other subjects, but he did not "study" English for one year to use it throughout his career. Just because he studied English does not mean he would not have problems with the language. He took some English classes while attending the preparatory school in Mexico.

After quitting school, he went to work as a welder's helper for a couple of companies in Mexico.

When Claimant came to the United States in 1994, he started working for his uncle as a sheet-rocker. He could not recall what his uncle paid him or how long he worked for his uncle. He also worked with sheetrock as a finisher in his next job, making $300.00 or $350.00 per week. He was a painter's helper in his next job. He believed it was with Robert's Painting, where he currently works as a painter. As a painter's helper, he earned about $600.00 every two weeks.[103] He believes he worked for Robert's Painting for approximately two or three years before working for Employer.

He went to work for Employer because he wanted to change jobs and earn more money. When he first worked for Employer, he drove a dump-truck. Once he was inside (the company), he could look for a job he knew how to do. When he started working for Employer, his father and brother were already working there. He could not recall the exact date he started working for Employer, but recalled earning $8.00 per hour. He could not recall the dates or hours he worked for Employer, just that sometimes he worked on Sundays. His work day would start at seven (7) a.m. and he would work until six (6) or seven (7) at night. His hours varied because sometimes it rained and he could not work.

[102] Claimant gave a deposition in his Jones Act suit on 14 May 2002. He did not recall testifying in that deposition that he took classes in physics, math, and biology.

[103] Although he did not recall how much he earned during his February 2005 deposition, he has since seen his income tax reports and can testify as to the amount. Accordingly, his memory was better at formal hearing then it was in February 2005.

He became a welder because his brother told their supervisor that Claimant knew how to weld. He passed a test to become a welder and began welding for Employer around December, 2000. Claimant never received certification as a welder. He worked for Employer twelve (12) hours per day, seven (7) days per week. Sometimes he worked even more hours. It surprised Claimant that Employer's records show him working, on average, less than 84 hours per week when he welded. He never had a problem with his paycheck not reflecting the work he performed.

He did not work long enough to earn paid vacation and could not recall whether he received paid holidays. In addition, Claimant was never offered any type of benefits. He did not know whether his father or brother received benefits either.

On 8 June 2001, Claimant worked on a dredge attaching "elbows to each end of that tube." Once the elbows were on, he would put a special material on the inside of the tube, using a come-along with a chain to tie it onto the tube and put it in a position to weld. The welding could only be done in a flat position so he had to turn the whole pipe, pulling on the come-along's ratchet. This required Claimant to get on the first or second step of a ladder to reach and put the pipe in position. While on the second step of the ladder,[104] he reached up and pulled the ratchet with his left hand, to get the pipe into position. It picked up speed, going its own way very rapidly. He did not have a chance to do anything. The come-along came towards him as if it were going to hit him in the face, so he pulled back. It started to move in the opposite direction and pulled his hand. [105] He believes a chain hit him with the same back and forth movement. It produced a cramp and he felt "like a spidery thing going all the way up . . ." to his head. He could not recall anything else after that moment. The 8 June 2001 accident happened so quickly he did not feel "disabled" and kept on working normally.

At the time of his injury, Claimant worked on the left side of the pipe, while a co-worker, Mr. Cavazos, worked on the right. The piece of pipe Claimant was welding on the inside stood about chest level. The pipe moved rapidly and pulled his left arm back and forth. He grabbed the come-along harder to try to stop it from hitting his face. His reflex was to move back his body and face, but the come-along pulled him. The chain hit his finger on the left hand.

[104] During Claimant's deposition in February 2005, he testified he could not remember what he was standing on, whether it was a ladder, stairs or something else.
[105] EX-15 fairly and accurately depicts the piece of pipe and the way it was hanging from the come-along.

The chain hit the end of his thumb, but did not bend it because his thumb was hit from the front. The chain did not cut his thumb or break any bones. Claimant could not recall whether he let go of the come-along when the chain hit his thumb, but he turned it loose after he moved away from the area.

After the incident, he moved rapidly out of the way. He still felt a cramp in his arm. Mr. Cavazos was at the other end of the pipe and asked him what happened. He said to Mr. Cavazos, "Well you saw how it was swinging[.]" Claimant waited a minute or two then continued working for the rest of the workday (about 4 hours) without any problems.

On 8 June 2001, Claimant got to work at six (6) a.m. by ferry. He got picked up from the ferry by a boat and taken to the dredge. The dredge was located in the Houston Ship Channel. He left work at six (6) p.m. and took another boat back to the ferry where his car was parked.

Mr. Arturo Rodriguez was the captain of the dredge Millenium and was Claimant's supervisor the entire time Claimant worked as a welder for Employer. Mr. Rodriguez was not on the dredge at the time of Claimant's accident.[106] After the accident, Claimant did not think he suffered any kind of serious injury and continued working. On 9 June 2001, he tried to go to work, but the whole neighborhood was flooded and he could not leave. He called the dredge, but could not recall who he spoke to. He was advised that "it was all right to come in the next day." On 10 June 2001, he again tried to go to work, but everything was flooded. Claimant returned to work that Monday, 11 June 2001, but did not work all day because he did not feel well.

On 11 June 2001, Claimant left work early in the morning, after advising the acting captain that he felt bad and about the accident on 8 June 2001. The acting captain told him "Then we'll take off and go look for someone to attend to you." The first time he informed anyone of his injury was on Monday, 11 June 2001. When he informed Employer that he needed a doctor, he also informed them about his 8 June 2001 accident.[107] Claimant denied lying when he said he informed Employer of his accident on Monday, 11 June 2001. He could not recall the questions that were asked during his first deposition and denied that his memory was better at formal hearing then three years earlier.

[106] Claimant testified during his February 2005 deposition that he could not remember whether Captain Rodriguez was on the dredge at the time of his accident. Claimant admitted to the discrepancy and testified he did not recall whether the captain was on the dredge.

[107] In his May 2002 deposition, Claimant testified he did not tell his supervisor of the incident "that [11 June 2001] day."

Claimant knew of Employer's policy requiring employees to report all accidents to their supervisors. When he was injured by the grinder in March 2001, he treated with Dr. Acevado at U.S. Healthworks. He could not recall how many times he saw Dr. Acevedo, but they performed surgery and removed stitches. U.S. Healthworks is Employer's clinic.

Any kind of arm movement hurts. The position he needed to place his arm in for work caused him to hurt all the way up to his left shoulder. He also felt cramps. He did not know what to do, so he went to the first place he could think of, Suburban Clinic. He did not get to the clinic until five (5) p.m. because the dredge was far away from his house and he needed his sister to accompany him to the clinic to help with translations. Claimant told his sister to tell the doctor that he felt badly because of what happened to him. "[T]hey started to ask questions and she explained."

He went back to the dredge on 18 June 2001, but could not remember much. Claimant spoke with Mr. Rodriguez before returning to work, and Mr. Rodriguez sent him to the company clinic, but he never spoke with a doctor directly. The clinic refused to attend to him. The nurses advised him that he needed a letter from Employer before they would attend to him. He returned to the dredge and explained this situation to Mr. Rodriguez, who advised Claimant that he could not give him a letter until Claimant went back to the clinic and got a letter from the doctor allowing Claimant to continue working.

Claimant asked Mr. Rodriguez what he was supposed to do, who responded "Well, that's no longer my problem. Go take care of it with the company. I can't help you anymore." Claimant then returned to the clinic for treatment, but was again refused. He decided to go home because he did not know what else to do. He then contacted an attorney.

He then went to Dr. Crawford's Clinic for an evaluation. He informed the doctor of his accident and had x-rays to determine whether there were any fractures. He received therapy and a referral to a specialist, Dr. Reynolds, who evaluated him to determine how much therapy he needed. Dr. Reynolds performed injections along Claimant's arm to evaluate all the nerves. At the moment of the injections, it helped, but afterwards the pain returned.

Claimant returned to work in February 2003 and has worked steadily since. His arm still gets tired. He also has pain in his arm when he sweats excessively and has problems picking up heavy things. So long as he has problems with his arm, Claimant does not think he could return to welding work, even if Employer hired him back. The heavy work requires him to use both arms to lift and hold things up, which hurts his hand.

Claimant did not return to work for Employer because they refused to authorize him to return.[108]

He did not look for any work from June 2001 until he started working as a painter at Robert's Painting, owned by Roberto Zeyala, in February 2003. He has known Mr. Zeyala for several years. Claimant mostly uses a sprayer machine to paint apartment walls, but also uses a roll or brush. He is required to prepare the walls before painting (including covering nail holes) using spackle, caulking, or paste used for sheetrocking. He sometimes has to carry five-gallon buckets of paint, but not at the same time. "Most of the time it's just one bucket or whatever the apartment needs . . ." He cannot carry two buckets at the same time. He may take them out and bring them to the apartment, but it does not mean he has to carry them both at the same time.

Claimant's doctors have not advised him that he should not work as a painter. He can physically do his job, but his arm does gets tired. Although he previously denied taking medication for his arm, he was recently given a prescription. The only medication taken for his arm has been after 18 February 2005, excluding any injections received from his doctors. If Carrier authorized surgery with Dr. Sanders, Claimant would have it.

He understands some English and can read and write in Spanish. Claimant could not recall whether Dr. Sanders ever spoke to him in Spanish.

He recalled treating with Dr. Hildreth at the request of the Carrier. He gave Dr. Hildreth the same description of the mechanism of his injury that was given at formal hearing.

Claimant's counsel referred him to Dr. Sanders.

Claimant does not have a criminal background.[109]

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[108] During Claimant's 18 February 2005 deposition, Claimant testified that the only reason he did not go back to work for Employer was because he felt they had something against him.

[109] EX-30 from the Texas Department of Public Safety, Crime Records Service, reflects a felony conviction of "Eduardo Gonzalez." This exhibit was given no weight towards credibility as Claimant denied having a criminal record and after formal hearing submitted certified statements from Cameron County, Jim Hogg County, Kleberg County, and Harris County, Texas, certifying Claimant has no felony indictments or convictions. Cameron County searched back to 1987 and their record revealed no felony indictments or convictions for Claimant. CX-34, p. 1. Jim Hogg County searched a period of 26 years and found no felonies or misdemeanors on his record. CX-34, p. 3. Kleberg County searched both their misdemeanor and felony files and found nothing pertaining to Claimant. CX-34, pp. 4-5. Harris County conducted a search from 1976 to present and no criminal charges were found on Claimant. CX-34, p.6.

Arturo Rodriguez, testified at trial that:[110]

He worked for Employer from 1998 until around 2003. He was the Captain on the dredge White Rock, then on the Millenium. As a captain, he was Claimant's supervisor. He has worked in the dredging business for about 25 years and was familiar with the job responsibilities of every position.

In June 2001, Claimant worked as a welder's helper, a person training to be a welder. He was not in the same position as Mr. Cavazos, who was a fabricator pipefitter. A fabricator has more skills then a welder. Claimant was a welder's helper for several months. He used to work in the disposal area before coming to the dredge to weld. Claimant's skills were not as good as Mr. Cavazos, but he was training. The amount of training necessary to become a welder depends on the person's skills. He could not answer how much training Claimant needed because it all depends on how his skills develop.

To his knowledge, Claimant did not have a welder's certification, although he does not know for sure. Mr. Cavazos was employed by Employer through a parent company. He was on loan to Employer, but Claimant worked for Employer directly. Claimant first earned $8.00 per hour and then $10.00 per hour after Mr. Rodriguez promoted him. The promotion got Claimant off the disposal area and brought him to the dredge as a welder's helper. Although he did not know how much Mr. Cavazos earned, Mr. Rodriguez imagined it would be more money than Claimant because of Mr. Cavazos' skills.

If Claimant wanted to come back to work for Employer he would be allowed to do so. It would not be a problem if he was limited to light duty only. At the time of Claimant's injury, Employer had light-duty and full-duty work available. Claimant left work to see a doctor and before Mr. Rodriguez would allow him to return to work, Claimant needed a "work release." If the work release said he could do light duty, Employer would have allowed him to do so. If Claimant came back to work for Employer, he would be paid the same amount he was paid before his injury.

Mr. Rodriguez currently works for Ben Goodman Marine. After he left Employer, Mr. Rodriguez operated dredges for about a month for Weeks Marine and then for T.W. LaQuay. He is currently a supervisor on a dredge, but does not operate them. At the time of Claimant's injury, Mr. Rodriguez was "the head man on [the Millenium] dredge . . ." He was the captain and below him was the deck captain, Alberto Cantu.

[110] Tr. 191-215.

Mr. Rodriguez could not recall if he worked on 11 June 2001. Either Mr. Cantu or he would have been present. During this time period, Mr. Rodriguez lived on the dredge, but when it was his time off he did not stay there. He believed the safety officer was Michelle Gonzalez. Her office was in Freeport. If Claimant went to the medical clinic and they needed authorization for medical treatment, the clinic would have called either Ms. Gonzalez or him.

If any calls were made by the clinic either he or Ms. Gonzalez would be the ones contacted, but nobody ever called him for authorization to treat Claimant. Ms. Gonzalez no longer works for Employer. If he was not present, it was sufficient to report the injury or accident to Ms. Gonzalez. He did not remember having a conversation with Claimant around 18 June 2001 regarding his accident. He also did not recall telling Claimant he could not give him a letter for treatment at the clinic or that in order for Claimant to return to work he would need a release from the clinic. Finally, he also did not remember telling Claimant that "he was on his own."

Claimant did not return to work after 18 June 2001. Mr. Cavazos's helper would have been Claimant. A welder's helper normally welds and cleans, using a grinder. A person watching a welder and a welder's helper may not be able to tell who was what. Claimant and Mr. Cavazos both welded, but Mr. Cavazos was also a fitter.

Mr. Rodriguez did not know why Claimant never returned to work.

Claimant was working on the dredge and then claimed he was hurt. Claimant informed him that was going to see a doctor. He told Claimant to bring back a doctor's release or a note stating his condition so he could determine what Claimant could do, i.e., if he could come back on light duty or full duty, what medications he took. When Mr. Rodriguez found out about Claimant's injury, Claimant told him that "his shoulder was hurting." Mr. Rodriguez was not there when Claimant went to the doctor, he found out afterwards. He could not recall when he actually found out, but it had to be within a few days.

When Mr. Rodriguez found out Claimant went to the doctor, he was advised that it was because Claimant's shoulder hurt and it was work related. To be safe, Mr. Rodriguez wanted to make sure it was okay with a doctor before putting Claimant back to work with heavy gear; however, he could not recall a conversation where Claimant asked him for authorization for medical treatment. Nobody ever informed Mr. Rodriguez that Claimant needed more treatment or that Employer and Carrier needed to authorize it. Nobody ever asked him if he authorized treatment. Claimant just never returned to work and Mr. Rodriguez did not know why. He did recall telling Claimant that "before we let you come back and work you're going to have to have a doctor's release."

Had Claimant returned to work with a medical restriction of light duty, there were numerous things he could have done. He could have made coffee, painted or handed rods to the welders, basically, being a welder's helper. Although Employer has acetylene and oxygen tanks, a light duty job would not require moving those things around. It is not Employer's policy to fire people after they were injured.

There were cleanup duties on the dredge that Claimant could have done if he had light-duty restrictions. The work would not be just to keep Claimant busy. Employer keeps guys around to do maintenance. He could have helped the guys that paint the dredge and clean, on an indefinite basis. It would have been a meaningful job. The light duty work Claimant could have done was not just conjured up for his benefit. The work would be necessary to the functions of the dredge.

Cleanup work is a never-ending job and Employer has plenty of jobs of that type. "[H]ousekeeping is a job itself." About 28 guys work on the dredge, with two as maintenance people. The maintenance people make the coffee. There is room for more than two people to do the maintenance job. The maintenance position could probably take on another one or two people, but he did not know for sure. They could make work if necessary, but normally just two people worked in the maintenance position. In June 2001, Employer did not have advertisements trying to hire a maintenance person.

Diane B. Hacker, testified at trial that:[111]

She is currently employed by Carrier as a senior workers' compensation specialist. She is the specialist working on Claimant's longshore claim. She has been employed by Carrier for 11 years, handling longshore claims the entire time of her employment and has been handling longshore claims, as an insurance adjuster, for about 13 years.

Medical bills submitted to Carrier in connection with longshore claims are paid according to the medical fee guidelines approved by the United States Department of Labor, Office of Workers' Compensation Programs. Claimant has submitted bills to Carrier for payment, most of which remain unpaid.[112] These bills were processed through Carrier's system to determine what it would pay under the approved fee guidelines for each itemized charge.

[111] Tr. 215-231.
[112] CX-29 (copies of unpaid medical bills incurred in connection with this claim).

It is her understanding that treatment by a chiropractor is allowed only if it is for manipulation to correct a subluxation of the spine either by x-ray or clinical exam. Dr. Crawford is a chiropractor. Carrier would not pay his bills because there was nothing submitted that indicated Claimant had subluxation of his spine. This is Carrier's standard procedure and there has never been a problem with the Department of Labor regarding Carrier's position.

Of the $2,020.00 in bills from North Houston Imaging, Carrier would approve $1,931.00 under the fee guidelines. Carrier would approve all of Dr. Mayorga's $201.00 bill, but only $2,242.00 of the $5,300.00 billed by United Neurology. Under the fee guidelines, Dr. Sanders would only be entitled to $194.00 of the $625.00 he charged.

CX-29 pages nine (9) and ten (10) is a statement from Dr. Reynolds reflecting an unpaid balance of $345.00. Although the statement does not reflect payment of this amount, Carrier actually paid the charges ($103.00 for 17 January 2002, $139.00 for 17 January 2002, $103.00 for 11 April 2002) under the fee guidelines. Review of the payment record indicated that on 20 August 2004 Carrier paid $182.00 to Dr. Reynolds for services of 17 January 2002 through 11 April 2002. Ms. Hacker went through Carrier's computer system and confirmed that the $182.00 payment correlated to the total of $345.00.[113]

Carrier requires all medical providers to obtain approval for all treatment in connection with a longshore claim from one of its workers' compensation specialists before treatment is provided or authorized. The process is called preauthorization. None of Claimant's providers ever requested preauthorization for treatment.

Dr. Reynolds referred Claimant to North Houston Imaging, but that bill was never paid.[114] Ms. Hacker did not know the reason this bill was not paid. Although in some state compensation cases chiropractors may do physical therapy for the treating doctor, in longshore cases they cannot do physical therapy unless they are a licensed physical therapist in addition to being a chiropractor. Ms. Hacker had no idea whether Dr. Crawford or the person performing services at his facility was also a licensed physical therapist. Unless Dr. Crawford is a licensed physical therapist, any bill submitted under his name will not be considered.

Dr. Mayorga's $201.00 bill was not paid, but Ms. Hacker did not know if it was ever submitted for payment. Dr. Mayorga's bill was faxed to the Littleton Group at the time it was generated. Ms. Hacker does not work for Littleton Group and has no knowledge of what Littleton Group paid or did not pay.

[113] EX-11 (reflects payment to Dr. Reynolds for $182.00 for services from 17 January 2002 through 11 April 2002).
[114] CX-29, p. 1 (bill submitted to Carrier by North Houston Imaging from 12 March 2002, for $2,020.00).

Neither Suburban Clinic nor HealthWorks contacted her on either 11 or 18 June 2001 for authorization to treat Claimant. Ms. Hacker worked for Carrier at that time. Diane Campbell was listed on documents as Carrier's representative. Ms. Hacker had no idea who Diane Campbell was, even though they have the same listed address. All of Carrier's offices use the same P.O. Box regardless of which office they work in. The P.O. Box is where all bills and reports are sent. Physically, Ms. Hacker is located in Austin, Texas.

Ms. Hacker reviewed Texas Workers' Compensation Commission 21, dated 3 July 2001.[115] Recently, Ms. Hacker obtained knowledge about state workers' compensation cases, but back in 2001 she did not know anything. In July 2001, Ms. Hacker was employed by Carrier as one of their workers' compensation longshore specialist. The other person in this position was Mike Oakes. Ms. Hacker could not recall whether she or Mr. Oakes made the determination that this case was a longshore case. Carrier had to have some knowledge of Claimant's injury if his claim was denied as a state workers' compensation claim.

A TWCC-73 is a work status report. Carrier had a work status report from Dr. Crawford and some kind of notice that Claimant was claiming an injury to his left shoulder, elbow, wrist and neck, while working for Employer on 8 June 2001. Ms. Hacker did not believe a controversion was ever filed in the longshore case.

Claimant initially pursued benefits under the Jones Act, but the District Court Judge determined he was not a seaman. Claimant subsequently filed a Claim for Compensation on 10 September 2002.[116] Claimant's Counsel sent the Department of Labor the Claim for Compensation on 1 October 2002. Therefore, it not until sometime after 1 October 2002 that Carrier received notice that Claimant was pursuing a longshore claim.

Employer's First Report, LS-202, was completed on 14 October 2002.[117] According to the form, Employer or Foreman first knew of the accident on 11 June 2001. On 8 June 2001, Employer had coverage under the Act. An injured employee has 30 days to report their injury to their employer. Even after receiving the LS-202, Ms. Hacker never initiated any benefits for Claimant. Carrier has paid $180.00 in spite of the lack of preauthorization. "It may have been paid in error."

[115] CX-32. (Carrier denied compensability/liability in its entirety as Claimant is a Longshore employee, not covered under the Texas Workers' Compensation policy).
[116] CX-19, pp. 2-4.
[117] EX-2.

***Hector Javier Cavazos Herrera*, *testified via deposition that:*[118]**

He lives in Irving, Texas. He was born 14 May 1955 in Monterrey, Mexico. He is not a United States citizen, but is legally permitted to be in the United States.[119] He completed the fifth grade in Mexico and has not returned to school. He understands English "pretty good," but does not speak it well. He can read some English and writes "very, very little." He spoke with Claimant "a long time ago" when Claimant called him and asked if he recalled what happened on 8 June 2001. They talked about whether he saw the pipe move. Claimant also asked him if he saw Claimant fall down. He informed Claimant that he did not. He could not recall the exact date of this telephone conversation (possibly four (4) months ago).

Mr. Cavazos no longer works for Employer. At the time of Claimant's injury, Mr. Cavazos worked for Employer. As of his 8 August 2002 deposition, Mr. Cavazos was an employee of Oscar Renda Contracting, a subsidiary of Employer's. Oscar Renda Contracting sent him to Employer for "one weekend," which turned into one year. He started working for Oscar Renda Contracting in 1992, but in 1994 he was suspended because there were no more welding jobs. He was called back in 1996, but cannot recall the exact date. From 1992 through 1998, Mr. Cavazos never worked for Employer. He stopped working for Oscar Renda Contracting on September 15, 2003. As of 29 April 2005, Mr. Cavazos welds in a repair shop for Texas Repairs.

He believes he was sent to Employer in 2000, but did not recall whether he worked there in 1999. He was not sure if he was an "employee" or not. He did not complete an application for employment with Employer, he was sent there by Oscar Renda Contracting. It was his understanding that Oscar Renda Contracting and Employer were related companies. With Oscar Renda Contracting he worked on land or lakes and with Employer he worked on water. When welding on water, everything moves, so he had to practice before going to work for Employer. It was the first time he did that kind of work on water. When he worked for Employer, he mostly dredged the channels in the Houston Ship Channel.

Mr. Cavazos worked for Employer for part of 2001, but could not recall when he was sent back to Oscar Renda Contracting. He believed he worked for Employer at the beginning of the year. In 2001, Mr. Cavazos was employed at least part of the year by Oscar Renda Contracting.

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[118] EX-9 (Mr. Cavazos testified via deposition, on 8 August 2002, with the assistance of an interpreter in Claimant's Jones Act case); EX-23 (Mr. Cavazos was deposed again in the Longshore case on 29 April 2005).

[119] EX-9, pp. 12, 98-100 (Mr. Cavazos filed an application through amnesty, which was accepted and he was given a number. Immigration documents pertaining to Hector Cavazos were attached as exhibits to the deposition).

As of the 8 August 2002 deposition, Mr. Cavazos worked for Oscar Renda Contracting as a certified welder.[120] A city will not allow someone to weld if they are not a certified welder "because the job has to be perfect." He was originally certified in February 1993, in Dallas, Texas. It was his understanding that on 8 June 2001, he worked for Employer as a certified welder. He could not recall the exact date, but an inspector told him his certification was old and he needed a new one. There is not much difference between a certified and non-certified welder. "[Y]ou can trust better those that are certified because that means that they can do it better[,]" because of welding temperatures. The temperature is very important, it will make a difference. The only other difference between a certified and non-certified welder is that a certified welder passed a test.

The welder's test required him to go to a laboratory and weld. He was also asked some personal questions. Employer contacted the testing facility before he went. He was given tools, put in front of a machine, and told what to weld. There were no written questions. The testing facility was located in Galveston, Texas, but he could not recall its name. The certificate was at Employer's office.

Mr. Cavazos worked on the dredge, the Millenium for one and one-half years. He started working there around May 1999. He also worked on the Millenium in 2001, but could not remember exact dates. After the flood, he worked aboard the dredge for about four more months.[121] During that period, he mostly worked "on the line." The "line" was the name of the project; it was not associated with the dredge Millenium. Before the flooding he worked approximately two (2) weeks aboard the dredge Millenium.

In June 2001, he welded (to patch and line) submarine pipes on the dredge Millenium. There were two other welders, Ramon Placencia and Claimant; however, Mr. Placencia was not working on 8 June 2001. Mr. Placencia was not a certified welder. He did not know whether Claimant was a certified welder. Even though Mr. Cavazos was the only known certified welder, they all did the same work. "If they were asked to do something, they would do it." The captain would instruct them on what to do. Mr. Cavazos told them how to do things better so things would not break and for safety reasons. He could not state whether he had more experience then Mr. Placencia or Claimant.

[120] EX-9, pp. 25, 101 (a copy of Mr. Cavazos' welder's certification, issued by Southwestern Laboratories, Inc., was attached to the deposition transcript as an exhibit. Southwestern Laboratories, Inc. no longer exists. When Mr. Cavazos went to Houston, he was given another certification test about one year ago. He could not recall the name of the Houston company who re-certified him).

[121] 8 June 2001 was one of the first days of the heavy rain that led into the flood.

He could not recall whether he ever went to Claimant for advice on how to weld better. He never went to Mr. Placencia to ask how he could weld better. He also never gave either orders on what or how to weld. The captain, Mr. Rodriguez would give all of them orders regarding what needed to be done. Mr. Rodriguez speaks Spanish.

Mr. Cavazos was shown pictures of the dredge Millenium.[122] The pipe that is partially vertical connected to a horizontal pipe at the bottom and top is about 24 inches in diameter and about nine (9) or ten (10) feet long. In early June 2001, they were welding the flanges. They were also welding inside the pipe with strong or hard welding.[123] Mr. Cavazos and Claimant were welding the 24-inch diameter line and elbows depicted in the deposition exhibit 4d.[124] When they welded, the piping and elbow were not connected in line, they were placed on the ground. They were doing "wall" welding "in 17, 18 and then the other one is a hard welding." The pipe would be laid on the floor and they put it on the other side. Claimant would have to rotate the pipes to weld them.

Mr. Cavazos also rotated the pipe to weld underneath it. To weld the lining inside the elbows, the pipes were rotated because a flat side of the tube needs to be found. If Claimant was welding lining into an elbow and he needed to rotate that elbow, he would use a come-along. A come-along is used to hold the tube from the very tip. A come-along is like a chain. It has a ratchet, a chain, and a gearing system. The come-along is in a vertical position and the top of it will be attached to something on the roof or ceiling, like a beam. The pipe with the flange has some holes and there is a hook that goes inside the holes.[125]

The come-along used in June 2001 belonged to the dredge. He recalled they had and used a lift on 8 June 2001, for the come-along.

Mr. Cavazos could not remember how many days he worked with Claimant. There were always three welders on a dredge. When welding on a dredge, the three welders would cook and eat there. There was a kitchen with benches. If there was not too much work, all the welders would break at the same time. He never spent the night on the dredge, but sometimes worked until 4:00 a.m. They went to shore to sleep.

[122] EX-9, pp. 50, 102-106 (Mr. Cavazos confirmed the pictures accurately reflect the dredge Millenium).
[123] EX-9, pp. 52-53, 105 (Mr. Cavazos indicated the area that they were welding and pictures are attached to the deposition as exhibits).
[124] *Id.*
[125] EX-9, p. 106 and EX-23, p. 88 (drawings depicting the positions of the pipe, come-along and I-beam).

He could not recall a day where the come-along came unattached and fell, but remembered the beam hooks shifted. Nothing came down, it just moved. He only saw this happen one time, but did not see who was using the come-along. It could have been Claimant. When the hook shifted, it came down a little bit because of the angle. He did not see it happen, but felt it. There is a lot of noise. When the hook on the come-along shifted it was attached to the pipe. The pipe was loose because it was not connected at either end - it just had the two 45 degree elbows. At the end of each elbow was a flange. At the time the come-along shifted, Mr. Cavazos was at the opposite end of the pipe, welding the flange on his side. The come-along was hooked to one end and Mr. Cavazos was welding at the other end.

He was told that "they" want to pull the pipe up. He continued welding. The person who was ratcheting up the come-along told him when he was about to start. That person started ratcheting, but then the hook at the top of the come-along shifted. The come-along could have shifted because the pipe is very straight and when the come-along started moving to the other side, the pipe moves in an angle. That is why the hook moved from one place to another, because of the weight. "They're saying that the pipe fell on [Claimant]. I don't remember that . . . I don't remember any of the incident." Claimant and Mr. Cavazos were doing the same type of welding work on opposite ends of the pipe.

At the time the come-along shifted, the top of it was attached to an I-beam and a chain held the pipe up. When necessary, a worker would get up and ratchet the come-along to make the pipe go up or down. The ratchet is like a handle. Mr. Cavazos did not put the hook/I-beam connection in place and did not know what it looked like at the time the come-along shifted. He also did not know who put the hook on the I-beam. When the come along shifted, he did not know how far it moved, he just felt it. He could not tell how far it moved because he had a welding helmet on and was welding. As far as he knew, the hook on the come-along was attached directly to the I-beam.

When the come-along shifted no one made any kind of noise, he just felt the movement. He could not recall whether someone was trying to adjust the come-along. He was told they wanted to turn the pipe a little bit, but he kept welding anyway. A pipe is rotated by lifting it up a little bit with a come-along. Next thing he knew, he felt the come-along shift. At the time the come-along shifted, Claimant was in the area. Mr. Cavazos never personally rotated the pipe using the come-along. Mr. Cavazos could not remember who was present on 8 June 2001.

Mr. Rodriguez was their captain and gave them orders. The morning of 8 June 2001, Mr. Rodriguez told them what to do and then left. They followed the captain's orders everyday. If Mr. Rodriguez wanted to, he could tell them what equipment to use. If you do not work by the rules, you can get expelled.

He found out someone was injured because Employer's office asked him for information about the incident. That is when he found out that someone filed a lawsuit against Employer due to the 8 June 2001 come-along shift. Claimant never informed Mr. Cavazos of his injury due to the come-along shifting. Claimant told Mr. Placencia something, but Mr. Cavazos did not know what. He also did not know whether Claimant said anything to Mr. Rodriguez.

Mr. Cavazos believed he worked with Claimant before 8 June 2001. He also thought that every time he worked with him, Claimant was physically able to do the work. He did not recall Claimant mentioning back, leg or arm pain. He could not say whether Claimant did a good job as a welder, but did not know of any complaints made against him.

After a pipe is welded, "[t]he people who work there" put the pipe back in line with the other pipes. If a pipe is out of place, being welded, the dredge is not functioning. The purpose of the dredge is to clean out dirt at the bottom of the channel, to suck it out and then transfer it over to shore through the pipe. All the pipes must be hooked up for a dredge to function.

It is important for the come-along not to shift because the pipe may get loose if does. If a come-along just shifts, he would not think a worker would get hurt, however, it is potentially unsafe.

When the come-along shifted, Mr. Cavazos had to stop welding because he lost his spot. The belly part of the pipe just lowered itself. Even though there was nothing between him and Claimant except the pipe, Mr. Cavazos did not see anything because he was not looking when the pipe moved. Had Claimant said anything after the shifting incident, Mr. Cavazos believed he would have recalled. He also would have remembered if Claimant fell to the deck. He did not see Claimant fall in any way. Claimant did not tell him he fell either. The come-along did not fall, had it fallen it would have injured both him and Claimant because the pipe would have fallen on them. It also would have made a lot of noise and done a lot of damage. He never saw the come-along on the floor.

While working on the dredge Millenium, he never saw Claimant get hurt. Claimant did tell him he got hurt on his thumb, but they continued working. Claimant told him later that he got hurt when the pipe moved.[126] Mr. Cavazos could not recall when Claimant told him. He never saw Claimant get hit by the come-along.

When Claimant called Mr. Cavazos, Mr. Cavazos informed him that he did not recall Claimant falling from the pipe or getting injured. Other than that one time, he has not spoken with Claimant since he stopped working for Employer. Had he seen Claimant get injured in June 2001, he would have testified to such. There was no reason for him to hold back information.

Mr. Cavazos wore a helmet "that has the little window" to look out of to protect himself while welding. He could not state whether Claimant also wore a helmet. Mr. Cavazos knew Claimant was shifting the pipe because he advised him that he was doing so. Claimant just yelled out he was going to move the pipe.

At the time the pipe shifted, there were other people there – "there's always some . . . other people, one or two more people there." He could not recall their names, but knows that there was one person there that would help Claimant move the come-along. The pipe was pretty high and when lowered, help would be needed. Claimant would not have been welding if Mr. Rodriguez had not ordered him to do so. Claimant was first hired as a helper, then "they gave him the opportunity to weld, so they gave him orders to weld."

On 8 June 2001, Mr. Rodriguez must have given Claimant orders to weld. The only welders that were there that day were himself and Claimant. Mr. Placencia was another welder, but it was his day off and he was not on the dredge. Prior to this incident there were a lot of jobs that he and Claimant worked together. He found Claimant to be a good worker. Mr. Cavazos could not recall whether Mr. Rodriguez ever told him to re-weld Claimant's work because he did a poor job, but sometimes he would check on Claimant's welding. He could not recall whether Claimant ever checked on his welding.

While working this project on the dredge Millenium sometimes they worked 12-18 hour days for ten (10) days straight. He earned $13.50 per hour plus overtime and per diem or $25.00. The overtime and per diem were for all the workers, including Claimant.

[126] EX-23, pp. 28-30 (although Mr. Cavazos testified in his August 2002 deposition that Claimant did not tell him he was injured on the day the accident occurred, during Mr. Cavazos' April 2005 deposition, he testified Claimant informed him sometime "that" day that he was hurt. He then testified Claimant did not say anything about being hurt).

Mr. Cavazos did not know anyone other than Claimant that witnessed the shifting of the come-along.

Mark Sanders, M.D. testified at trial that:[127]

Since 1982, he has been an orthopedic surgeon and was board-certified in general orthopedic surgery in 1989. In his practice, he treats patients with cubital tunnel syndrome and also performs surgeries.

He always initially treats patients non-surgically. He provides them with anti-inflammatory medications and tells them how to position their arm to get their work done and get on with their life. He tells them not to lean on their elbows and about 50 percent of the patients get better. The rest require a minor surgical procedure to release the ulna nerve from scarring. He described the ulna nerve as the funny bone nerve. When a person has problems with his ulna nerve, sometimes it can be moved to the front of the elbow so it is no longer in that funny bone position. This is one operation that is an acceptable remedy for ulna nerve entrapment or cubital tunnel syndrome. It is not the only remedy, but is one reasonable surgical treatment for ulna nerve problems.

He first saw Claimant in May 2002. After Claimant's initial examination, Dr. Sanders scheduled an electrical test to determine whether Claimant had entrapment of the ulna nerve at the elbow level and also referred him to a board-certified neurologist, Dr. Mohammad Athari, for nerve tests on the ulna nerve. He has referred other patients to Dr. Athari and finds him reliable. Dr. Athari determined the study was consistent with moderate left ulna neuropathy at the elbow. As a result of Dr. Athari's testing, Dr. Sanders diagnosed Claimant's condition as cubital tunnel syndrome or ulnar nerve entrapment at the elbow.

At the time of Claimant's initial examination, he had complained about his injury for about one year. Because Claimant was also treated by several other doctors, Dr. Sanders opined that the only "reasonable" thing to do "would be to do surgery to repair [the ulnar nerve]."

Claimant described the mechanism of his left arm injury to Dr. Sanders. In the afternoon of 8 June 2001, Claimant was welding a large, heavy pipe for Employer. The pipe had a "come-along" suspended from above and attached to the pipe. He would ratchet up the pipe to turn it then ratchet the pipe back down. On the day of Claimant's injury, he used his left hand to ratchet up the pipe, but after getting the pipe raised a few inches, the heavy pipe started swinging, jerking

[127] Tr. 44-86.

his left arm back and forth. Claimant told Dr. Sanders the ratchet handle hit his thumb and he instinctively jerked his arm back. He concluded Claimant had a "wrenching" injury to his arm, pulled on it and subsequently had a traction injury to the ulnar nerve. As Claimant's arm got pulled and wrenched, it twisted at the elbow, hurting his ulnar nerve.

Dr. Sanders never examined Claimant, prior to 8 June 2001 and was not present at the time of injury, but the story Claimant told him appeared to be compatible with the development of ulnar nerve entrapment at the elbow. To the best of his medical certainty and based on the information he had, the 8 June 2001 accident was the proximate cause of Claimant's current problems.

On 10 September 2001, Claimant underwent an electromyogram (EMG) study, which the neurologist read as normal. Dr. Sanders explained why they were normal. A few weeks after Claimant's injury, there would be a normal study and then a later positive test. A neurological test will not be positive on the day of injury because nerve injury is progressive. First there is bleeding in the nerve area, then subsequent fibrosis around the nerve. It develops over a period of four to six months after an accident. When the problem becomes full blown, then it will show up on the electrical test. Therefore, the fact that Claimant had one normal EMG and a subsequent positive EMG was entirely compatible with the syndrome because it "takes about six months to develop."

A common presumption is that numbness in one's hand comes from the neck and if a person went to his family or industrial doctor, it is "almost a done deal that . . . that would be their clinical impression." Therefore, he believed that all of the treatment Claimant received was necessary, reasonable and well-intentioned, even though the diagnosis was wrong. Dr. Reynolds localized Claimant's treatment to his elbow. The ulnar nerve sits right behind the medial epicondyle. It is "pretty hard to differentiate medial epicondylitis from ulnar nerve neuritis on a clinical basis[,]" because the two sit right next to each other. Claimant probably complained of ulnar nerve pain at the time Dr. Reynolds made his diagnosis, because it was most likely tender everywhere. Therefore, treatment with injections of Depo-Medrol and Xylocaine were also reasonable. Dr. Reynolds was "warmer but not, not there yet."

Dr. Sanders has performed approximately two or three hundred ulnar nerve surgeries. After such a surgery, the people in recovery might advise him that their elbow still hurts, but their fingers feel okay. This degree of recovery can be instant. Over a period of six weeks he puts them on exercises to help get back all the range of motion in their elbows. On average, after six weeks a patient who had this surgery is ready to go back to work. Some are better after four weeks, some

after six, but rarely more than six weeks. In general, somebody with cubital tunnel syndrome has a weak grasp because the interroseus hand muscles, which causes a person to have a power grasp, are not getting enough nerve supply. As such, their hands would be weak and their fingers numb, causing them to drop things.

A "working man" would have to learn trick motions and start using his other hand, instead of the injured hand, to do the work his injured hand used to do. The more the patient learned, the better he could function. If he could not do all those things because of numbness and weakness, he could not live with the cubital tunnel syndrome.

Dr. Sanders mostly treats knees and upper extremities. His website, sandersclinic.net, talks about his specializing in arthroscopic surgeries on severe shoulder and knee injuries. The website mentions the things his clinic does the most, but is not an exhaustive list of everything it does. There is no mention about treatment of elbow injuries or ulnar nerve entrapment on that page, but it does mention them on other pages.

Dr. Sanders does not refer patients with problems in their hands, wrists or arms to orthopedic surgeons who specialize in treatment of those body parts because he has "good training in those areas" and likes "doing them . . . with the exception of nerve grafts[.]" He refers those cases out because he is "not a great micro surgeon[.]" He also refers replants out to other doctors. Other than nerve grafts and replants, Dr. Sanders handles everything else himself. He is aware that there are orthopedic surgeons who have a recognized subspeciality in the treatment of upper extremity injuries and conditions.

Most cases of verifiable carpal tunnel syndrome or ulnar nerve entrapment at the elbow are related to diabetes, thyroid disease, rheumatoid arthritis or menopausal changes, and as such, are ordinary diseases of life and not occupational injury or disease. They particularly relate to the occurrence of these conditions as a result of repetitive micro trauma.

Dr. Sanders treated Claimant on four separate occasions: 8, 24 March 2005, 22 October 2002, and 30 May 2002. Per Claimant's request, he also wrote a letter on 12 August 2002, but was not sure whether he actually examined Claimant that day.

During the examinations, they communicated in both English and Spanish with help from Dr. Sanders' employees. Dr. Sanders speaks "halting" Spanish, but all of his employees are Latinos. He gets through the Spanish okay and has his

employees "take it to the next level . . ." if he cannot, but his "medical Spanish is pretty good." He could not specifically recall whether they conversed in English or Spanish. He had copies of the reports and letters he generated regarding Claimant. There was no mention of a translator or interpretation in his reports.

Dr. Sanders reviewed his report dated 11 August 2002,[128] which stated Claimant "was involved in an industrial accident on June 8, 2001, and injured his left elbow, fracturing of the olecranon." An olecranon is a piece of bone at the tip of the elbow. It is "[t]he pointy one that you point, that you lean on a desk." As of 11 August 2002, he was under the impression that Claimant suffered a non-displaced fracture of his olecranon. "If that was a mistake then I made it." There was another mistake in his report where he referred to Claimant as Ms. Stohr, stating he had no excuse "except [his office] was updating our computers around that time and [his] transcriptionist probably corrupted the file." Any reference to "burn wounds" was also a mistake. The report stated that Claimant "received 'local care for burn wounds without very much relief.'" The report corruption would also explain the wrong date on the report. In his report, he estimated the cost of future medical treatment inclusive of surgery, hospitalization, anesthesia, and rehabilitation as approximately $15,500.00 in 2002, in Harris County, Texas, and surrounding areas.[129]

He also reviewed the MRI report of Claimant's elbow dated 13 March 2002, done by J.S. Lee, M.D.[130] Dr. Lee did not see a crack in Claimant's olecranon, but saw degenerative joint disease and tenosynovitis. The report said nothing about a fracture, dislocation or abnormal bony signal lesion to Claimant's left elbow. It appears that when Dr. Sanders saw Claimant in August 2002, he did not have a left elbow fracture. If Claimant had fractured his left olecranon it would have long since healed. Dr. Sanders believed that when looking through Claimant's records, some doctor must have stated Claimant fractured his olecranon and he "just picked that up."

He reviewed Dr. Hildreth's 10 March 2005 report,[131] which stated the "x-rays of the left elbow and left hand fail to elicit any gross bony abnormalities." Although there was no acute fracture of the olecranon, there "might have been a healed fracture of the olecranon, which certainly would have considered no gross bony abnormalities in [Dr. Sanders'] opinion, so we just don't know." If the x-ray Dr. Sanders saw in 2002 was the x-ray from 2001, and it had a chipped fracture of Claimant's olecranon, there is a good chance that it healed by the time the MRI was taken a few months later.

[128] CX-6, pp. 3-4.
[129] Id. at 4.
[130] EX-21.
[131] EX-12.

X-rays are better than MRIs for detecting bony abnormalities. After reviewing the MRI report, Dr. Sanders noticed Dr. Lee also performed an x-ray and saw "no acute fracture or dislocation, or abnormal soft tissue calcification, so no acute fracture[,]" but it could have been a healed fracture. According to their reports, neither Dr. Lee nor Dr. Hildreth saw a healed fracture of the olecranon.

Dr. Sanders also reviewed his report dated 8 March 2005,[132] which had a very detailed description of Claimant's history. He did not take such extensive histories in his earlier reports of Claimant. Per his recollection, Claimant gave the detailed history to Norma Hernandez, Dr. Sanders' principle Spanish interpreter. Although earlier he could not recall whether an interpreter was involved in Claimant's case, after looking at the report, specifically Claimant's report of his medical history, the chances he got that from Claimant were "extremely low." "[T]herefore it now jogged my memory and I remember that Norma sat down with a pencil and paper and got this from him . . . and then we transcribed this into the record." Dr. Sanders was not just assuming, he specifically recalled that was what happened. Dr. Sanders' Spanish is good enough to discuss medical problems, but talking "about pipes and come-alongs," is beyond his Spanish speaking abilities.

The 8 March 2005 report reflected Claimant continued to have pain in his left arm. Claimant had EMG and nerve conduction velocity (NCV) studies in August 2002 and the testing demonstrated an ulnar nerve neuropathy at the left elbow. Both the 10 September 2001 and 1 August 2002 EMGs were normal, but the NCV of Claimant's left arm revealed a slow NCV of the left ulnar nerve across the elbow. This is an indication of ulnar nerve entrapment at the left elbow, which is why Claimant needs the ulnar nerve decompression. As of 8 March 2005, Claimant had not reached MMI and still needed surgery.[133]

Because Dr. Sanders' Spanish is not good enough to write down Claimant's complete history, he relies on the person doing his complex interpretation. Ms. Hernandez wrote the information down and then translated it for the record. He could not say directly whether Claimant told Ms. Hernandez that the ratchet handle from the come-along is what hit his thumb, but the normal course of business required Ms. Hernandez to write down what Claimant told her. He is not at a level of excellence in Spanish transliteration; therefore, he must rely on Ms. Hernandez's translation of what Claimant told her. When Dr. Sanders gave his understanding of Claimant's injury history, he read from the 8 March 2005 report, as compiled by his Spanish translator. The history was given in connection with a visit to Dr. Sanders' office around that time.

[132] CX-24.
[133] Id.

Although complaints of ulnar nerve entrapment may start right away, the electrical findings may not be positive for six months. He believed the diagnosis of cervical radiculopathy by Claimant's treating physicians was wrong. Dr. Reynolds' diagnosis of medial epicondylitis was probably right, however, because it is "pretty easy" to have both problems at the same time. The cortisone injections improved Claimant's medial epicondylitis; therefore, the diagnosis was probably correct. The medial epicondyle and ulnar nerve sit right on top of one another. As a result, it is reasonable to think that its adjacent structure would also hurt.

A maximum of ten (10) to fifteen (15) percent of his patients are referred to him by attorneys. Claimant was referred to Dr. Sanders by his attorney. Dr. Sanders charged a flat rate $1,000.00 for his testimony in court because Claimant's Counsel assured him that his testimony would only take one hour. At the time of formal hearing, Dr. Sanders already received his fee. If his testimony went past five o'clock he would send Claimant's Counsel another bill.

A disciplinary proceeding was initiated against Dr. Sanders by the Texas State Board of Medical Examiners in 1995 in connection with his treatment of a patient with carpal tunnel. He resolved that matter by agreement, but is currently under investigation once again by the Board of Medical Examiners.

Dr. Sanders was neither aware that Dr. Athari was previously disciplined by the Texas State Board of Medical Examiners nor that he was also under current investigation by the board.

He explained that repetitive micro trauma does not cause cubital tunnel syndrome or ulnar nerve entrapment, but it can be caused by a wrenching, a twisting, a traction, or a direct injury to the elbow, such as being hit in the elbow with a hammer. If a person wrenches the elbow, from ordinary flexion and extension, they will not develop cubital tunnel syndrome. However, if a person has a wrenching or twisting type of injury, such as what occurred to Claimant, then the injury is compatible with the development of cubital tunnel syndrome. Holding an arm extended and getting caught is only one mechanism of injury, but there are several other traumatic and damaging mechanisms of injury, including taking the arm and twisting it, which might be called a "valgus mechanism of injury." In addition, twisting the elbow in a forceful and violent manner can also cause such an injury.

Dr. Sanders could not identify any published peer reviewed articles supporting his opinion about the causation of Claimant's injury and its relationship to cubital tunnel syndrome, explaining he was not sure such an experiment can be done on human subjects. In almost every textbook of neurology and

electromyography, however, it says EMGs do not become positive after a neuropractic injury for six weeks. The textbooks state it takes a minimum of six weeks to see changes of denervation. He could not think of the name, author, or publisher of any such textbook because he did not come prepared to. Although the textbooks say it takes a minimum of six weeks for an EMG to become positive, Claimant's case took six months. "Most people will say the minimum of six weeks to several months to see changes. Now, is several six, is several four[?]"

Dr. Sanders does general orthopedic surgery and sports related issues. He also does a great amount of work as a designated doctor in the State of Texas for workers' compensation. He treats a "huge number" of Referred Medical Examinations, as well as people injured as industrial workers.

As he understood Claimant's history, he sustained an angular traction type trauma to his arm – "a traction with the elbow bent." The absence of a fracture on the x-ray is a "quirk on the x-ray." If no one ever mentioned a fracture to him, it would not have made a difference in his assessment of Claimant whatsoever.

Generally, cubital tunnel syndrome is associated with non-occupational causes, such as diabetes and aging, but not exclusively. These causes are very common, as well as repetitive micro trauma or using the computer too much. He put these causes in his website because he does a lot of occupational medicine. Sometimes during examinations where patients inform him they use the computer too much, he can find diabetes, high blood pressure, thyroid disease and menopause as the cause. On the other hand, a single traumatic event could also cause such injuries. In the absence of Claimant's specific history, Dr. Sanders would have suspected another cause for the cubital tunnel syndrome. Claimant does not have diabetes, rheumatoid arthritis or menopause. Dr. Sanders based his opinion on Claimant's subjective history. The presence or absence of an actual fracture is not significant.

Medical literature does not recognize a fracture as the cause of ulnar nerve entrapment. A serious fracture, however, such as a "fracture dislocation of the elbow can cause an ulnar nerve injury at the same time, but if there's a chip fracture of his olecranon or not I don't think that would be . . . or the absence of one would rule out an ulnar nerve injury . . ." It would just be a "fellow traveler," something that happens to come along.

Claimant complained about pain and numbness in his hand and elbow on 22 October 2002.[134] In addition, on 24 March 2003, Claimant continued to report pain in his hand and elbow. Accordingly, Claimant requires surgical treatment for his elbow.[135]

[134] CX-6, p. 2.
[135] Id. at 1.

David Howard Hildreth, M.D., testified via deposition that:[136]

he is a full time active orthopedic surgeon with the Department of Orthopedic Surgery, Baylor College of Medicine in Houston, Texas.[137] He is board-certified in orthopedic surgery with a subspecialty in hands and arms. His practice is limited to hand surgery, which really means from the shoulder down. He has a certificate of added qualification in hand surgery. He is also an associate professor of orthopedic surgery at Baylor College of Medicine and a clinical associate of orthopedic surgery at the University of Texas Health Science Center in Houston.

Dr. Hildreth examined Claimant for an independent medical evaluation on 10 March 2005. As part of this examination, he took Claimant's history and used his report to convey the information.[138] Claimant, through an interpreter, informed him that on 8 June 2001, he sustained an injury to his left thumb and his left upper extremity. Claimant worked as a welder and used a "come-along" which Dr. Hildreth understood to be a device that helps lift things. It is a ratchet-type apparatus. The chain on the come-along broke and made Claimant's arm jerk back. Claimant said he had some pain in his arm and the chain hit the tip of his thumb, right next to the nail. Claimant worked the rest of the day, but continued to have pain. On 11 June 2001, Claimant was evaluated, treated and returned to light duty work by the workers' compensation clinic. Claimant had continued pain in his arm and saw several doctors since his injury, but could not recall all of his doctors' names.

Claimant also told Dr. Hildreth what was hurting him on 10 March 2005. His arm hurt intermittently and his hand and arm felt weak especially after working. Initially he would be okay, but once he starts working his hand progressively weakens. Claimant also complained of numbness in the volar side (or palm side) of his forearm.

Dr. Hildreth's translator has worked in his office for five (5) years and her expertise was actually one of the reasons he hired her. He uses her a lot throughout the day to translate Spanish. He has never had any questions as to the accuracy of her translations. She did not appear to have difficulties communicating clearly with Claimant.

Dr. Hildreth performed an examination on Claimant, including musculoskeletal, neurological, vascular and radiological examinations. The musculoskeletal exam revealed Claimant had good range of motion in his left shoulder compared to his right shoulder, which was the unaffected side. There

[136] EX-13.
[137] EX-13, pp. 4, 50-65 (attached to Dr. Hildreth's deposition, as ex-1 is a copy of Dr. Hildreth's curriculum vitae).
[138] EX-12.

was no tenderness to palpation in the left shoulder. Range of motion in his cervical spine was full without crepitation or pain. He also had full range of motion in both elbows without crepitation or tenderness to palpation. There was no instability noted in the left shoulder to provocative maneuvers or the left elbow to provocative maneuvers. In addition, all provocative maneuvers of the left wrist were negative for any ligamentous instability or pain. Examination of the left hand, specifically the left thumb revealed no evidence of the instability at the CMC joint, which is the base of the thumb, the MP joint which is the big knuckle of the thumb, or the IP joint which is the last joint on the thumb. Finally, there was no evidence of any changes in the nail which would have been a natural deformity from the injury Claimant described.

Claimant's neurological examination revealed negative Tinel's at the infraclavicular fossae, the area on either side of one's clavicle up around the neck. The Tinel's was positive over the left cubital tunnel. The Tinel's sign is similar to hitting the funny bone. It is specifically described as tapping over the nerve and having an electric shock or dysesthesia sensation in the distribution of the nerve. If the elbow is tapped at the funny bone nerve and it tingles, the Tinel is not positive. A positive Tinel's is tapping the funny bone nerve and having the electric sensation go down the arm into the fingers. Claimant's ulnar nerve did not sublex.

Fifteen percent of the population has an ulnar nerve that sublexes, which can be one of the anatomical causes of cubital tunnel syndrome. Claimant's passive level flexion test was negative. At his wrist, the Tinel's and Durkan's tests were negative. Claimant's motor exam was rated five over five, five being normal. Therefore, all of Claimant's motor exams were intact. Claimant's vascular exam was also intact and his x-rays were without gross bony abnormalities.

Crepitation is felt when a joint is moved and there is arthritis – it crunches. There is also soft tissue crepitation where two tendons or two muscles rub together if there is inflammation. It sounds like two rocks grinding together.

A provocative maneuver is a test an examiner performs to elicit a response from the patient. It asks for a subjective response for an objective finding. For example, when there is a broken bone, if the two bones grind together and it hurts, it is a provocative maneuver for the broken bone.

Dr. Hildreth could not recall how much time he spent examining Claimant. He used the typical tests used by orthopedic surgeons with hand specialties. He also took x-rays of Claimant's left elbow, hand and wrist. The x-rays showed no bony abnormalities that would cause his complaints. If Claimant had a healed fracture, it would have shown up on the x-ray. There were no healed fractures, no

evidence of arthritis, no deformity, and no soft tissue swelling noted on the x-ray that would be consistent with the Claimant's complaints. He did not recall whether Claimant brought films for him to review. He was provided with Claimant's medical records since June 2001. He reviewed those records in connection with preparing his report.

He diagnosed Claimant with findings consistent with cubital tunnel syndrome. Claimant's specific complaints were only slightly to mildly suggestive of cubital tunnel syndrome. Claimant complained about pain in his upper arm, shoulder and neck. Dr. Hildreth could not explain those complaints based on his examination. That is why he reported those complaints were of an unknown etiology. He did not see any objective evidence to support Claimant's complaints.

As of 10 March 2005, Dr. Hildreth did not see any evidence to indicate an ongoing shoulder injury. In addition, he did not think Claimant had any impairment to his shoulder as a result of his workplace incident. He did not see any evidence to indicate an ongoing injury to Claimant's cervical spine either. Dr. Hildreth "does not believe" that Claimant has any impairment to his surgical spine as a result of the 8 June 2001 incident. He also did not see any evidence to indicate an ongoing injury to Claimant's thumb as a result of the incident. If Claimant has any impairment to his left thumb or hand as a result of the incident, it is less than one (1) percent. There is no basis for saying Claimant has any impairment to his thumb or hand as a result of the 8 June 2005 incident.

There were some findings consistent with cubital tunnel syndrome. Based on Claimant's history, he had some very mild complaints that might have been consistent with cubital tunnel syndrome. He also had a positive Tinel's at the cubital tunnel and nerve conduction studies performed by Dr. Athari were positive for cubital tunnel syndrome. There were things in Dr. Hildreth's exam that were inconsistent with or contradicted a finding of cubital tunnel syndrome, such as the negative passive elbow flexion test. Of all the provocative maneuvers for cubital tunnel syndrome, the passive elbow flexion test is the most sensitive. The sensitivity is still probably 60 or 70 percent. This part is not an exact science, but it is a test that helps doctors make that diagnosis. The passive elbow flexion test is more specific than the Tinel's sign test.

An abnormal two-point discrimination for cubital tunnel syndrome is a very late finding, so there can be cubital tunnel syndrome with a normal two-point discrimination.

> As the cubital tunnel progresses, and it is a progressive problem, the nerve becomes more scarred and as it becomes more scarred, it, the sensation, gets less. So your two-point

> discrimination goes from being able to differentiate three or four points, 3 or 4 millimeters apart to you can tell if the points are eight or ten millimeters apart.[139]

In his experience it normally takes much longer than four years for a positive or abnormal two-point discrimination test to show up.

Dr. Hildreth did not recall seeing a copy of Dr. Nguyen's NCV report when he prepared his report.[140] If he had seen it, he would have commented on it in his report. According to Dr. Hildreth, Dr. Nguyen's report says both left median and left ulnar nerve latencies and conduction velocities are normal.

When a nerve is injured it undergoes "Wallerian degeneration." This process has been well studied and takes three weeks. A nerve can be significantly injured, but no change may be seen in the electrodiagnostic studies. Three weeks later, after it has undergone Wallerian degeneration, changes are seen in the nerve that can be quantitated by a NCV study. After that three-week period, the nerve starts to recover from the injury. Therefore after three weeks a NCV study may show an injury, but if after an amount of time a second NCV study is completed it will show either the nerve recovering or it is the same. It might show that the nerve is worse, but routinely it shows that it is recovering from specific injuries. A judgment is made based on the two studies. If the second NCV study shows the injury going in another direction, then a third study should be done, to determine what direction the injury is going.

He opined that if Claimant had an injury to his left ulnar nerve on 8 June 2001, there was enough time for it to show up on 26 August 2001, seven weeks later. The NCV study tests how well the nerve conducts an electrical signal and if there is a compression point, in Claimant's case cubital tunnel syndrome, the NCV should be able to pick up that compression point because the electrical impulse traveling down the nerve changes above and below the elbow. The cubital tunnel is the funny bone. If there is no compression (i.e. no nerve injury, no damage) then the conduction velocity is the same within percentages above and below the elbow. Nerves have a sensory and motor component.

An EMG tests the motor component and the sensory component is almost always affected before the motor component. To make a decision as to the reliability between the normal report of Dr. Nguyen done about seven (7) weeks after the alleged injury and the abnormal NCV study done by Dr. Athari about a year after, Dr. Hildreth would want to see an additional test to determine the direction Claimant's nerve injury is headed.

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[139] EX-13, p. 18.
[140] EX-13, pp. 19, 66 (Dr. Nguyen's NCV report was attached to Dr. Hildreth's deposition as ex-2).

Even though the reports conflict, Dr. Hildreth would not question their findings, he would just conduct a third test to determine whether Claimant needed active treatment. It is critical that the third test be done by either doctor that already tested him. It is important that a third person does not test Claimant because nerve conduction studies are operator dependent. The same person needs to do the same study or test over and over again, in the same environment, for there to be accurate results. He did not have a preference between which doctor performed the third study.

Dr. Hildreth did not detect any sensory or motor loss in Claimant's left arm. "Sensory findings are a late findings of someone who has cubital tunnel. They have longstanding cubital tunnel syndrome as do motor findings." An orthopedic surgeon cannot diagnose cubital tunnel syndrome or recommend surgery, within a reasonable degree of medical probability, solely on a patient's complaints or a positive Tinel's sign. Dr. Hildreth would not support a recommendation for ulnar nerve decompression based solely on Claimant's complaints and positive Tinel's sign. The results of a Tinel's test can be manipulated by a patient and an orthopedic surgeon can get a false positive. He based his opinion not only on his personal experience, but on published medical literature and what is taught in medical schools.

If Claimant has cubital tunnel syndrome, Dr. Hildreth did not believe it was caused by his workplace accident on 8 June 2001.[141] Based on the mechanism Claimant described and Dr. Hildreth's understanding of the physiology of the nerve, he cannot with reasonable medical probability understand how Claimant could have cubital tunnel syndrome from that injury. There is a long list of documented causes of cubital tunnel syndrome, but most people fall into an idiopathic group, which the medical community is "not entirely sure why they have it." Recognized traumatic causes of cubital tunnel syndrome include fractures or dislocations of the elbow, traction injuries to the arm, direct blows to the elbow or to the nerve itself, nerve contusions, and deformities in the elbow from any of the above-named traumatic causes. Although Claimant is a candidate for surgery related to his cubital tunnel syndrome, Dr. Hildreth opined, it is not a compensable procedure in regard to his work-related injury. However, the treatment Claimant received related to his cervical spine, shoulder and elbow "can be justified due to [Claimant's] history of traction-type movement" of his arm being jerked by the chain or pulley. [142]

[141] EX-12, p. 4.
[142] Id.

Nothing in Claimant's medical history shows he sustained a direct blow to his elbow. The x-rays conclusively prove Claimant had no fracture or dislocation to his elbow. In addition, the mechanism of injury Claimant described was not a traction-type injury. A traction-type injury is where someone catches their arm or hand in something, it grabs them and when they try to pull out their arm, they fall and their body weight stretches their arm. It is a pulling of the arm which stretches everything from the neck out to the fingertips.

Dr. Hildreth opined that Claimant reached maximum medical improvement (MMI) as a result of any injuries he sustained on 8 June 2001 by the time he saw him on 5 March 2005. Claimant probably reached maximum medical improvement before he saw him. From a review of Claimant's medical records, Dr. Hildreth could not give an opinion as to when Claimant reached MMI, but saw no reason Claimant could not return to full duty work as of 10 March 2005. Looking at the records, he thinks Claimant got hit on the thumb by a chain. He was not sure whether he actually jerked his hands back, but Claimant told him he did. Dr. Hildreth accepted the history given to him by Claimant. It is borne out in the records and Claimant told a number of people the same history. Those injuries would be some type of soft tissue injury that in Dr. Hildreth's experience routinely recover in three (3) to six (6) weeks, three (3) months maximum when there is difficulty returning to work.

Although his report recommended surgery, Dr. Hildreth would hold off until the nerve conduction studies are repeated. The average recovery time from an ulnar nerve decompression takes anywhere from three (3) weeks to three (3) months. At that time, the patient can return to work. For maximum medical improvement, the average time is six (6) to twelve (12) months. During the period between return to work and maximum medical improvement, some people require therapy to get their range of motion back, but only if the scar is desensitized enough that they are comfortable and able to work. The time frame really allows the surgeon to make sure nothing else will happen and that the nerve will continue to improve during that time. If Claimant had an ulnar nerve compression, Dr. Hildreth would expect him to return to full-duty, in the welding field, within the three-week to three-month period.

In Dr. Hildreth's experience, if Claimant had the surgery, given its success, his maximum impairment would be one or two percent impairment of the whole body. A one (1) percent whole body impairment translates to a three (3) to five (5) percent impairment to Claimant's arm. Based on his examination as of 19 May 2005, Claimant did not have any permanent impairment to his left arm. Dr. Hildreth opined Claimant could return to work, in a welding capacity, without restrictions as of 10 March 2005 and probably could have returned to work six months after his injury.

Dr. Hildreth reviewed Dr. Sanders' office note dated 8 March 2005, which had a much more detailed description of Claimant's mechanism of injury.[143] The movements described in Dr. Sanders' report could not have caused ulnar nerve injury or cubital tunnel syndrome. Dr. Hildreth disagreed with Dr. Sanders' comment that not experiencing immediate pain is common, in fact patients "have pain rarely commonly." He did not know of any study that quantitates exactly when, but in his experience it is quite common to experience pain relatively soon, if not immediately after the injury.

Claimant appeared truthful. Dr. Hildreth could not answer what would have attributed to a false positive Tinel's sign other than manipulation. He did not feel like Claimant manipulated him or told him the Tinel's sign was positive when it really was not. In his experience, jerking back and forth, a forceful or sudden flexion extension of the elbow is not a mechanism of injury for cubital tunnel syndrome. He again described a traction injury as when somebody has his hand or wrist caught in some sort of machine that is pulling his arm into the machine, while he was trying to get away from the machine, pulling back. The arm would be straight. The elbow might be flexed, but it depends on how it is in the machine. Because he was trying the get his arm out of the machine, he was pulling as hard as he could with his whole body weight and the machine was pulling.

Dr. Hildreth thought it was very possible that Claimant had a soft tissue injury to his arm just in pulling his arm away after getting whacked on the thumb, but he did not believe it was an ulnar nerve problem of cubital tunnel syndrome. Dr. Hildreth performs about 50 or more transpositions of the ulnar nerve per year. A patient with pain in his elbow would first be treated non-operatively. He would first identify if the passive level flexion test exacerbated the symptoms. If it did, then the patient would be placed in a splint and given elbow pads to see if it improved the symptoms. If it did not improve the symptoms, then he would obtain electrical diagnostic studies by a neurologist he trusted. If the nerve conduction studies became positive, then classification would change to McGowan Two classification for cubital tunnel syndrome and meet the indications for surgery. Indications for surgery include failing non-operative care, having positive nerve conduction and being symptomatic.

He explained where the nerve is transpositioned to:

> if you feel the inside of your elbow, there is a bone you feel there. That's the medial epicondyle. If you feel behind your elbow, there is another bone that's the olecranon. Between

[143] EX-13, pp. 34, 71-72 (Dr. Sanders' 8 March 2005 office notes were attached to Dr. Hildreth's deposition as exhibit no. 3).

> those two bones is where the nerve lives normally, and that's the cubital tunnel.
>
> You take the nerve and move it from behind the medial epicondyle to the front[144] of the medial epicondyle. If you put your fingers in that groove there, as you flex and extend your elbow, that's where the nerve lives. If you put your fingers then in front of the medial epicondyle and flex and extend your arm, that's where the nerve moves to.

Looking at medical literature and Claimant's medical history since 2001, if Claimant had another positive nerve conduction study showing an impingement of the ulnar nerve, there is no indication in his records as to when the cubital tunnel syndrome occurred.

The passive elbow flexion test is another provocative maneuver or test to help determine whether someone has cubital tunnel syndrome. Claimant had a negative passive elbow flexion test. To test whether the ulnar nerve subluxes requires putting fingers in the groove where the ulnar nerve lives and bending the elbow. About 15 percent of the population has unstable nerves and it pops over the edge of the medial epicondyle. An unstable subluxing nerve with findings consistent with cubital tunnel is the final indication for surgery. When the nerve does not sublux, it is a good sign. It does not mean there is no cubital tunnel syndrome just that it did not come out of the particular groove.

Dr. Hildreth does about four or five of these examinations per year, for insurance companies. Claimant is the only patient he has seen for Employer's Counsel.

Cubital tunnel syndrome is a slowly progressive problem, which no one has been able to document how fast that progression is. Left for some length of time (i.e. a number of years), the damage would be such that even surgery would not make the patient better. Surgery is done to prevent the problem from getting worse. Statistically, most people improve with cubital tunnel surgery. The operation is not done to make the patient better, but to prevent them from getting worse. Therefore, a patient with numbness may have residual numbness after surgery. The measures for success are primarily pain relief. Eighty-five to 90 percent of the people get better with surgery. As such, Claimant would improve with surgery. If Claimant had another normal nerve conduction study, Dr. Hildreth would not have a medical explanation for Claimant's left arm pain and discomfort. He is not an expert on whether it would be psychosomatic.

[144] EX-13, p. 39 (the "front" means the inside of the arm).

Dr. Hildreth reiterated that the history Claimant gave to Dr. Sanders, that he was using his left hand on the ratchet handle meaning a come-along suspended from above, the pipe raised a few inches started to swing and jerk Claimant's left arm back and forth, in his opinion would not be a mechanism for injuring the cubital tunnel.

Suburban Physicians Center's medical records reflect:[145]

Claimant presented to Suburban Physicians Center on 11 June 2001 at 5:00 p.m., with complaints of numbing left arm and fingers since that morning. He stated the cause was unknown and denied an injury.

Claimant was at work, as a welder, when he felt tingling and numbness in his left forearm and hand. He did not complain of weakness, trauma or neck problems. He was prescribed Naprosyn and ordered to return in 14 days, if not better. He was diagnosed with radiculopathy. Claimant received a certificate to return to work, reflecting an ability to return to work on 12 June 2001, with no lifting more than 20 pounds with his left arm until 18 June 2001.[146]

He returned to Suburban Physicians Center on 18 June 2001 for a follow-up. Claimant complained his left arm felt heavy and was diagnosed with left arm weakness. The treating physician noted that Claimant would get evaluated by the clinic from work.

U.S. Healthworks of Texas' medical records reflect:[147]

Claimant treated with Dr. Acevedo, at U.S. Healthworks of Texas, on 18 June 2001. Claimant informed Dr. Acevedo that he was injured at work on 11 June 2001. Dr. Acevedo diagnosed Claimant with cervical radiculopathy. He also prescribed physical therapy three times per week for one week and a medrol dosepack. This was a work-related injury and Claimant could return to work with restrictions on 18 June 2001.[148] Claimant was restricted, as to his left arm, to no grasping, squeezing, or wrist flexing/extending. He was also ordered not to lift or carry anything. The restrictions were expected to last from 18 June 2001 through 22 August 2001.[149] Claimant was to follow-up on 25 June 2001, but there is no record from that date.

[145] CX-10; EX-24.
[146] CX-10, pp. 2-3.
[147] CX-11.
[148] Id. at 2 (copy of the Texas Workers' Compensation Work Status Report).
[149] Id.

Claimant had a previous work-related injury on 22 March 2001 and treated at U.S. Healthworks after cutting himself with a grinder while working.

Mark W. Crawford's, D.C., records reflect:[150]

Claimant initially treated with Dr. Crawford, a chiropractor, on 26 June 2001. He examined Claimant and the extent of his injuries were diagnosed as: (1) cervical IVD without myelopathy; (2) cervical radiculitis; (3) strain/sprain of the wrist, hand, and fingers; (4) strain/sprain of the elbow; (5) strain/sprain of the right shoulder; (5) myalgia; and (6) myospasm. Claimant was released from work at his initial visit and remained off of work. Claimant has not discussed his work status with Dr. Crawford since 22 August 2001.

Dr. Crawford completed a Workers' Compensation Initial Evaluation Report on 27 June 2001. Claimant described the mechanism of injury. He was dragging a pipe into a canal when the chain holding the pipe broke loose, hitting him on the hand, causing a shooting electrical sensation going up his arm to the shoulder. Claimant informed Dr. Crawford that he did not go back to the company doctor because when he tried to, the doctor did not wish to see him a second time. He was sent back to work with restrictions to limit movement of his left arm. Claimant complained of frequent pain in his left shoulder joint, elbow, wrist, and hand. Frequent pain is defined as pain during 50-70 percent of awake time. Claimant denied prior symptoms within one year of his 8 June 2001 accident.

Maximum compression for cervical nerve root compression was positive on the left, producing moderate pain. The orthopedic evaluation also revealed positive cervical distraction producing moderate pain on the left. There was tenderness upon palpation at the cervical region and non-spinal tenderness at the left posterior cervical, left upper trapezius, left pectoralis major, and left serratus anterior/posterior. Claimant's cervical range of motion tests were all within normal limits and the cervical radiographic evaluation revealed no fractures. In addition, Claimant's left shoulder radiographic evaluation also revealed no apparent fractures. Dr. Crawford prescribed physical therapy five times per week. The treatment program focused on diversified adjustive technique and joint mobilization at the cervical spinal levels and left shoulder. Therapy included massage, ultrasound, hot packs, and electrical stimulation on the cervical, shoulder, left elbow and left wrist regions to reduce pain, swelling, and inflammation. He instructed Claimant to wear an EMS unit and perform specific stretches.

[150] CX-16.

On 27 June 2001, Dr. Crawford evaluated Claimant's work status. Based upon Claimant's subjective complaints and his objective examination, Claimant was temporarily totally precluded from regular work duties. Claimant initially became disabled on 26 June 2001. It was too early for Dr. Crawford to determine whether Claimant would have any residual permanent disability.

Claimant received physical therapy three to five times per week, from 27 June 2001 through 28 March 2002.[151] Therapy included interferential stimulation, ultrasound and massage to Claimant's left shoulder, left elbow, neck and left wrist regions. It also included spinal manipulation of the cervical spine and joint mobilization of the left elbow. He tolerated the therapy well, but had increased spasms, decreased range of motion, and tenderness.

Dr. Crawford completed several Texas Workers' Compensation Work Status Reports (TWC), describing Claimant's work restrictions. The 26 June 2001 TWC provided that Claimant's work injury prevented him from returning to work from 26 June 2001 until 26 August 2001. On 31 July 2001, Dr. Crawford extended Claimant's no work status through 26 September 2001, but on 18 September 2001, again extended Claimant's no work status until 26 December 2001. The 14 February 2002 TWC, stated Claimant was prevented from returning to work as of 26 June 2001 and was expected to continue through 14 April 2002. Dr. Crawford amended the TWC on 21 February 2002 to reflect Claimant could return to work as of 21 February 2002 with restrictions which were expected to last through 21 March 2002.

Claimant's restrictions included a maximum pushing, pulling, reaching or overhead reaching for four (4) hours per day. It also restricted Claimant to working a maximum of four (4) hours per day. He could not lift or carry objects more than 20 pounds. These restrictions were specific to Claimant's left arm.

On 25 April 2002, Dr. Crawford suggested Claimant undergo an arthroscopic evaluation and possible debridement of both joints at the left shoulder.

Gilbert Mayorga's, M.D., medical records reflect:[152]

Claimant presented for an initial consultation with Dr. Mayorga on 13 July 2001, by referral from Dr. Crawford, with a history of a job-related accident occurring around 8 June 2001. Claimant described his employment as that of a "welder." At the time of his injury, Claimant was dragging a pipe into a canal with a chain when the chain broke loose hitting him in the hand. This caused

[151] CX-16, pp. 7-30.
[152] CX-8.

Claimant to instinctively jerk back his arm. Claimant sustained injuries to his neck, shoulder, arm and hand. Claimant advised Dr. Mayorga that he first noted the onset of numbness on his left arm. He also advised Dr. Mayorga that he reported his injuries to his employer and on 25 June 2001 Employer sent him to Suburban Clinic, where he was initially evaluated, given oral medications, and returned to work on light duty. After treating at the Suburban Clinic, Claimant was referred to U.S. Healthworks to Dr. Acevedo, who recommended physical therapy, but Claimant only attended one visit with Dr. Acevedo. Claimant also sought the services of Dr. Crawford who conducted an initial examination, took x-rays, performed physical therapy and referred Claimant to Dr. Mayorga. Claimant complained to Dr. Mayorga of pain and discomfort to his neck and left shoulder areas. He also complained of some intermittent occasional pain to his elbow, hand and wrist regions.

Physical Examination revealed mild to moderate tenderness to palpation of Claimant's cervical spine with slight tenseness of the paracervical muscles noted and painful range of motion, slightly decreased in all directions. Dr. Mayorga also noted mild tenderness to palpation over the AC joint of Claimant's left shoulder also with painful and decreased range of motion. Claimant's shoulder joint was stable and the balance of the left shoulder examination was essentially unremarkable. There was no tenderness to palpation of Claimant's left elbow, with normal range of motion in all directions. There was some mild tenderness to palpation on the radial side of Claimant's left wrist with painful and decreased range of motion. The wrist joint, however, was stable and the balance of the left wrist examination was essentially unremarkable. Finally, Claimant had some mild tenderness to palpation of his left hand with painful, but complete range of motion in all directions of the digits of the hands.

Based on Claimant's history and physical examination, Dr. Mayorga's impressions were: (1) cervical spine strain; (2) myofascitis of left shoulder; (3) rule out impingement syndrome; (4) contusion of the left hand; (5) sprain of the left elbow; (6) myofascitis of left forearm by history; and (7) resolving left wrist sprain.

Dr. Mayorga discussed his plan with Claimant and placed him on oral medications of Flexiril, Darvocet, and Celebrex. Dr. Mayorga also recommended continued therapeutic modalities. He referred Claimant back to Dr. Crawford for continued management and conservative care.

Thai Duc Nguyen's, M.D., medical records reflect:[153]

Dr. Crawford referred Claimant to Dr. Nguyen. Claimant gave a history that he was injured at work on 8 June 2001 when his left arm was pulled and "it hurt right away." Claimant complained of pain from his neck down to his left arm and hand, with numbness in his left upper extremity. He also told Dr. Nguyen that he felt weak in his left hand grip and left arm. Therapy has provided Claimant with some relief.

During his neurological examination, on 10 September 2001, Claimant was alert and answered all of Dr. Nguyen's questions with broken English. There was little weakness in his left hand grasp without muscle wasting. Claimant's sensation was decreased with pin prick in the whole left upper extremity. His deep tendon reflexes were 1+ in all extremities without Babinski sign. Claimant felt tender to palpation in the left side of his neck, shoulder, arm and forearm, however the EMG and NCV studies were within normal limits in the left upper extremity.

Claimant had a cervical sprain with nonspecific paresthesia in the left upper extremity. He recommended an MRI of the cervical spine and continued therapy with Dr. Crawford.

Claimant's 10 September 2001 EMG report, showed no signs of denervation or renervation in the left upper extremity and left paraspinal region.[154] Claimant's 26 August 2001 NCV report, showed a normal upper extremity study.[155]

Ian Reynolds', M.D., medical records reflect:[156]

Claimant first saw Dr. Reynolds on 3 August 2001 and provided him with a history of his 8 June 2001 work injury and subsequent treatment. He described dragging a pipe into a canal and the chain holding the pipe broke loose and hit him on the thumb jamming it. At the time, he felt a shock-like sensation radiating up his left arm and shoulder. He complained of weakness in his left shoulder and elbow, grip strength weakness and numbness more than pain. Physical examination revealed normal ranges of motion of the thumb and IP joint, wrist, elbow, shoulder and neck. There were some mild trapezius spasms on the left and tenderness to palpation over the lateral epicondyle. He also had more pain with flexion of the thumb with a positive Finkelstein test, which is indicative of

[153] CX-12; EX-17, 20.
[154] CX-12, p. 3; EX-16.
[155] EX-17.
[156] CX-15.

deQuervain's tenosynovitis. Claimant had symptoms of numbness and weakness in the left arm with unknown etiology. He prescribed Claimant Vioxx, one per day and suggested EMG and NCV studies of the left arm. He also recommended continued conservative treatment with Dr. Crawford.

Claimant next saw Dr. Reynolds on 27 September 2001 and showed some improvement with physical therapy. Dr. Reynolds reviewed the normal EMG and NCV studies. Claimant still complained of some mild left anterior chest wall and pain radiating down from the left elbow to the hand. Physical examination revealed full range of motion of the left shoulder and mild tenderness to palpation of the medial aspect of the left elbow. Dr. Reynolds assessed Claimant with "medial epicondylitis, still possible radicular pain versus flexor carpi ulnaris tendonitis." He recommended elbow injections of Depo-Medrol and Xylocaine. He also recommended continued physical therapy for the left upper extremity and follow-up in one month.

Claimant returned to Dr. Reynolds on 17 January 2002, with continued pain in his left elbow. There was some relief with the last injection, but he still had tenderness to palpation over the medial aspect of the elbow. Dr. Reynolds again assessed medial epicondylitis. He recommended repeat injections in the medial epicondyle and joint. If Claimant did not improve after those injections, he suggested an MRI of the left elbow because Claimant may have impingement or bursitis that is causing pain to radiate down his left arm.

Claimant's last visit to Dr. Reynolds was on 11 April 2002. Claimant's test revealed osteoarthritic changes of the left elbow, glenohumeral joint, and AC joint on his left side. His symptoms were consistent with generalized pain problems of the left shoulder girdle and left elbow. The last injection in Claimant's elbow and shoulder had no effect. "Therefore, with the diagnosis of mild to moderate hypertrophic degenerative joint disease of the elbow and of hypertrophic changes and small joint effusion of the glenohumeral joint, [Dr. Reynolds] would suggest the patient undergo arthroscopic evaluation and possible debridement of both joints as an out patient." Dr. Reynolds reviewed the MRI films and agreed with the interpretation of the radiologist.

Boris Payan's, M.D., medical records reflect:[157]

He initially saw Claimant for pain management upon referral from Dr. Crawford on 17 December 2001. Claimant provided him with a history of his 8 June 2001 work injury and subsequent treatment. Claimant's shoulder had no restrictions of motion, but his muscle strength was decreased in his left side in comparison with the right. He had difficulty with rotation of his left wrist and tenderness around his left elbow. Examination of Claimant's hand showed

[157] CX-17.

dystrophic changes when compared with his right hand. The left hand was also very dry in comparison with the right. Dr. Payan provided a provisional diagnosis of status post injury to the left hand, arm, wrist, and elbow and subclinical complex regional syndrome Class 1. He recommended continued care with Dr. Crawford and medications.

***North Houston Imaging Center's records reflect*:**[158]

On 12 March 2002, an MRI of Claimant's left elbow was conducted, showing small joint effusion, slightly more along the posterior aspect, with minimal joint capsule distention. There was no evidence of a fracture, dislocation, or abnormal bony signal lesion. There were some arthritic changes along the medial aspect of the ulno-troclear joint compartment with sizable marginal spurs along the coronoid process of the ulna with reduction of this joint compartment. The MRI revealed tenosynovitis with corrugation and thickening. The common extensor tendon revealed no abnormal increased signal intensity or tear with no tendonitis. There was no cubital tunnel or radial tunnel syndrome noted. The median nerve was within normal size and signal and there was no pronator or supinator syndrome noted.

X-rays of Claimant's left elbow revealed no fracture, dislocation, or abnormal soft tissue calcification. Again, the doctor noted more arthritic changes along the ulno-troclear compartment.[159]

An MRI of Claimant's left shoulder was also taken on 12 March 2002, revealing that Claimant's supra and infraspinatus tendons were intact and there was no rotator cuff tear.[160] There were mild hypertrophic changes and small effusion of the glenohumeral joint. Mild hypertrophic changes were also noted at the AC joint with small marginal spurs with small fluid collection and mild acromion bursitis with no subacromial arch impingement syndrome. Claimant's supscapularis tendon and glenohumeral ligaments were within normal limits and the coracohumeral ligaments showed no tear or capsulitis. The MRI of the left shoulder was otherwise normal.

X-rays of Claimant's left shoulder were also taken.[161] The x-rays revealed no fracture, dislocation or deformity, but some mild hypertrophic changes were noted at the joints. There was also small marginal spurring at the inferior aspect of the AC joint at the end of the clavicle. There was a very small 2mm calcified density seen near the superior portion of the glenohumeral joint, near the superior glenoid process, such as a small focal calcified tendonitis or small calcification in

[158] CX-13, EX-21-22.
[159] CX-13, p. 2; EX-21, p. 2.
[160] CX-13, p. 3; EX-22, p. 1.
[161] CX-13, p. 4; EX-22, p. 2.

the superior labrum or possibly small loose body in the superior portion of the glenohumeral joint. As such, it is unlikely that the calcified density is a small avulsed fragment.

Claimant filled out an intake sheet in Spanish.[162]

Mohammad Athari's, M.D., medical records reflect:[163]

On 11 July 2002, Claimant presented for an evaluation and treatment of injuries sustained in a job-related accident on 8 June 2001, upon referral from Dr. Sanders. Claimant informed Dr. Athari that while working he fell and landed on his right side and twisted his left side. He complained of neck pain radiating to his shoulders and arms and an inability to lift his arms and hands since the accident. Dr. Athari reviewed the MRI of the left elbow, which reported left elbow tenosynovitis and 5-6 mm thickening around the medial proximal portion of the extensor tendon, consistent with lateral epicondylitis without any tear. Examination revealed spasms of the cervical paravertebral muscles and tenderness upon palpation of the left shoulder and supraspinatus muscle on the left side. There was also tenderness on palpating over the medial epicondyle of the left elbow and weakness of the grip on the left side. Claimant had hypersensitivity in the C5-6 and C7 territories of the left upper extremity. According to Dr. Athari, Claimant had a left shoulder contusion, traumatic injuries to the left elbow, and possible cervical radiculopathy.

Dr. Athari performed the EMG and NCV studies. The 1 August 2002 EMG of the upper extremities was unremarkable, except for 1+ fibrillation potential and reduced recruitment pattern in the left flexor carpi ulnaris. The EMG of the paraspinal level did not reveal spontaneous activity. Dr. Athari opined Claimant suffered from moderate left ulnar neuropathy at the left elbow.

Dr. Athari performed additional EMG and NCV studies upon Claimant on 20 May 2005. The "motor NCV of the right median and right ulnar nerve and bilateral radial nerve was normal. This is a slow NCV of the left ulnar nerve across the elbow." The EMG remained unchanged and unremarkable. Dr. Athari confirmed his previous opinion that Claimant suffered from moderate left ulnar neuropathy at the left elbow.

[162] CX-13, p. 5.
[163] CX-22.

Surveillance video showed that:[164]

> Surveillance of Claimant was taken 16-17 February 2005. The video reflected 29.48 minutes of surveillance time. During this period Claimant was seen lifting large plastic paint canisters into the bed of his truck with his left hand on two separate occasions. On 16 February 2005, he was seen lifting a large plastic paint canister into the bed of his truck with his left arm. However, he used his right arm to assist, kept his left arm lower, and it was not evident of how much the can weighed. At that time, he was also seen lifting a ladder overhead with both arms.
>
> On 17 February 2005, Claimant was again seen lifting a large plastic paint canister into the bed of his truck, but it appeared that the can was not filled with paint, but some type of paper. Finally, he was seen carrying a ladder with his right arm to his truck, lifted his left arm to help, and then shifted the ladder using both arms, placing the ladder into the truck.

Analysis

Injury

This case presents not only an issue regarding a medical opinion, but also "mingled elements of fact[s], medical opinion[s] and inference[s]."[165] The instant record consists of medical opinions coupled with the testimony of Claimant, Claimant's supervisor and Claimant's co-worker at the time of injury.

There is clearly sufficient evidence to invoke the 20(a) presumption that Claimant injured his left arm and developed cubital tunnel syndrome as a result of the 8 June 2001 on-the-job injury.

Claimant testified that he struck his left thumb while welding on 8 June 2001. He was moving a pipe using a come-along which caused him to suffer an injury to his left arm. Claimant needed to move the pipe, but after the pipe was raised it began to swing back and forth. Claimant kept his grasp on the ratchet and twisted his arm, jerking it back and forth. Although he did not immediately associate the pain with the incident that day, he has consistently done so since.

Dr. Acevedo of U.S. Healthworks noted in his medical records that Claimant suffered a work-related injury (cervical radiculopathy) and gave Claimant work restrictions from 18 June 2001 through 22 August 2001 of no lifting, carrying, or grasping. He also prescribed physical therapy.

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[164] EX-8.
[165] Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962).

Even though Claimant's co-worker, Mr. Cavazos did not see Claimant get injured, he confirmed the movement of the come along.

On 11 June 2001, Claimant's arm still hurt, so he went to the Suburban Clinic because he did not know where else to go. He complained that his left arm would go to sleep and also complained of numbness in his forearm and fingers. When Claimant returned to Suburban Clinic, he was advised that Employer would not authorize additional treatment. He was sent to Employer's Clinic on 18 June 2001 where he was diagnosed with cervical radiculopathy. He was given a light duty release to return to work with restrictions of no lifting or carrying and no grasping/squeezing or reaching with his left hand or arm.[166]

Employer's Clinic recommended physical therapy and Claimant received physical therapy through Dr. Crawford, a chiropractor. Claimant was also referred to an orthopedic surgeon, Dr. Reynolds, who assessed Claimant with probable DeQuervain's and lateral epicondylitis, left arm. In May 2002, Claimant started treating with Dr. Sanders who diagnosed Claimant with cubital tunnel syndrome or ulnar nerve entrapment at the left elbow. Claimant gave the same description of his mechanism of injury to all doctors involved in this case. Claimant underwent three separate nerve conduction studies. The latest study on 20 May 2005 reflected "moderate left ulnar neurapthy at the elbow."[167]

Dr. Hildreth described recognized traumatic causes of cubital tunnel syndrome to include fractures or dislocations of the elbow, traction injuries to the arm, direct blows to the elbow or the nerve itself, nerve contusions and deformities. Dr. Hildreth described a traction injury as a pulling of the arm which stretches everything from the neck out to the fingertips. Claimant's description of his arm being jerked back and forth fits this description of a traction injury.

On the other hand, there is evidence sufficient to rebut the presumption.

Mr. Cavazos did not see Claimant injured.

Claimant admitted that he worked the rest of the day and that his arm did not start bothering him until he returned to work on 11 June 2001.

Even though Claimant had a previous work related injury and knew he should have gone to U.S. Healthworks for treatment he went to Suburban Clinic instead. Suburban Clinic's notes reflect an "unknown cause" of the problem and that Claimant "denies injury."

[166] CX-11, pp. 1-2.
[167] CX-31, p. 2.

Dr. Hildreth testified that although Claimant suffered from cubital tunnel syndrome, it could not have occurred from the mechanism of injury described by Claimant. At the same time, he also testified that the treatment Claimant received to his cervical spine, shoulder and elbow, can be justified due to Claimant's history of a "traction-type movement" of his arm being jerked by the chain or pulley.[168]

Dr. Hildreth's denied a causal relationship between Claimant's cubital tunnel syndrome and his 8 June 2001 injury. He based his opinion on the different results of the nerve conduction studies (one positive and one negative). Even though the results conflicted, Dr. Hildreth did not question the doctors' findings. To resolve the conflict, Dr. Hildreth suggested a third study, performed by one of the previous doctors, to determine the direction Claimant's injury was headed. A third study was performed in 2005 and showed ulnar neuropathy at the elbow, confirming cubital tunnel syndrome.[169] The record was left open for Dr. Hildreth's opinion regarding the third study. No response was ever submitted.

Given the rebuttal of the presumption, the burden is on the claimant to establish by the weight of the evidence that the injury was work-related. I find that the weight of the evidence in the record as a whole establishes that is that it is more likely than not that Claimant suffers from cubital tunnel syndrome and that the syndrome is a consequence of the work injury on 8 Jun 01.

Medical Care and Benefits

Claimant sought to recover medical costs and disability associated with his injury to his left arm. Claimant received treatment from North Houston Imaging, Dr. Crawford, Dr. Mayorga, Dr. Athari, Dr. Sanders, and Dr. Reynolds, none of whom have received payment for treatment. Claimant initially treated at Suburban Clinic; he did not go to Employer's Clinic. After he received treatment from Suburban, he notified his supervisor that he needed additional medical treatment. He was sent to U.S. Healthworks and saw Dr. Acevedo, who recommended physical therapy. Claimant later went to Dr. Crawford for physical therapy. At no time did he make a "choice of physician" through Employer. Claimant's supervisor did, however, advise him that he was "on his own" and Claimant stopped coming to work. Claimant subsequently sought his own treatment without preauthorization from Employer. Claimant believed he was refused continued treatment based on his conversation with his supervisor.

Dr. Hildreth testified that the treatment Claimant received related to his cervical spine, shoulder and elbow can be justified due to his history of a traction-type movement of his arm being jerked by the chain. As such, it was both reasonable and necessary for Claimant to seek treatment for his left arm. U.S. Healthworks advised Claimant to seek physical therapy. However, since Dr. Crawford is a chiropractor and not a licensed

[168] EX-12. p. 4.
[169] Id.

physical therapist, under the Act, Dr. Crawford is not entitled to reimbursement.[170] Claimant is entitled to reimbursement and payment of all other medical treatment related to his left arm injury.

Claimant's treating physicians and Employer's doctor agree that Claimant needs the requested surgery. Claimant's treating physicians opined that surgery is necessary for him to reach MMI. Although Dr. Hildreth denied that Claimant's cubital tunnel syndrome was related to his work injury, he admitted that Claimant was a candidate for the surgery. The record establishes the requested surgery is reasonable and necessary.

Maximum Medical Improvement

The consensus of the medical records and testimony reflects that Claimant needs surgery to correct his cubital tunnel syndrome and potentially improve his condition. Accordingly, Claimant has not yet reached MMI.

Nature and Extent of Injury and Suitable Alternative Employment

Claimant's treating physicians – Dr. Sanders, Dr. Reynolds, and Dr. Athari – all opined that Claimant needs surgery. Dr. Hildreth also testified that Claimant needed surgery to correct the cubital tunnel syndrome (but denied that it was causally related to Claimant's work injury). In addition, the medical consensus is that Claimant's condition will not be permanent until he reaches maximum medical improvement.

Claimant was initially placed on work restrictions of no lifting over 20 pounds on 14 June 2001, by Suburban Clinic. He was then treated at Employer's clinic where he was allowed to return to work on light duty. As of 18 June 2001, Claimant stopped going to work entirely. Claimant began treatment with Dr. Crawford on June 26, 2001. Dr. Crawford took Claimant off of work completely[171] and referred him to a neurologist, a pain management specialist and an orthopedic surgeon. All of these doctors kept Claimant off work.

Although examinations performed on Claimant did not achieve "positive" results, Dr. Hildreth testified that cubital tunnel syndrome is a slowly progressive problem. In addition, Employer argues that there was no subluxation of the nerve, but Dr. Hildreth testified that just because there is no subluxation does not mean there is no cubital tunnel syndrome, just that it did not come out of a particular groove. It is recognized that the original EMG and NCV studies of 26 August 2001 appeared normal, but the later studies in September 2002 were not. All the medical testimony agreed that it takes time before a positive result will be reflected. Dr. Hildreth opined that a third study should be done by either Dr. Athari or Dr. Nguyen. A third study was conducted in May 2005 and reflected

[170] 20 C.F.R. § 702.404 (chiropractic treatment is reimbursable only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings).
[171] CX-16, pp. 31-46.

abnormal results consistent with moderate left ulna neuropathy at the left elbow. Dr. Hildreth originally stated that he had no reason to doubt the results of either Dr. Athari or Dr. Nguyen and never responded to the new study conducted in 2005. Dr. Hildreth admitted that Claimant would meet the indications for surgery if the NCV studies became positive, which in May 2005, it did.

Dr. Crawford completed Texas Workers' Compensation Work Status Reports which reflected that Claimant was prevented from returning to work from 26 June 2001 through 14 April 2002,[172] but later reflected he could return to work on 21 February 2002 with restrictions expected to last through 21 March 2002.[173] No doctor provided other dates for Claimant's return to work. Claimant did not return to work until February 2003. He now works as a painter for Roberts Painting. He has worked for Roberts painting since February 2003 without interruption or problems. Surveillance video shows Claimant lifting large paint canisters and lifting ladders over his head, using both his left and right arms.[174]

Claimant testified he never received treatment from Employer's clinic. He specifically testified that he never saw a doctor and was turned away because he did not have a letter from Employer authorizing treatment. The records reflect otherwise. Claimant was treated at U.S. Healthworks, Employer's clinic, on 18 June 2001, by Dr. Acevedo, regarding his work-related injury. U.S. Healthworks treated Claimant on 18 June 2001 and released him to return to work with restrictions.[175] Claimant was restricted (as to his left arm) to no grasping, squeezing, flexing or extending. These restrictions were expected to last through 22 August 2001. Claimant never returned to U.S. Healthworks for follow-up treatment, as prescribed. These medical records directly conflict with Claimant's testimony that Employer's clinic refused to treat him.

Dr. Hildreth is not Claimant's treating physician and only examined him on one occasion. On the other hand, Dr. Crawford, although he is a chiropractor, referred Claimant to neurologists, orthopedists, and pain management specialists who all agreed that Dr. Crawford was providing adequate care and that Claimant should continue conservative treatment with Dr. Crawford. At no point did Claimant's other doctors question Dr. Crawford's opinions or treatment plan. In addition, Dr. Hildreth testified that all medical treatment Claimant received regarding his cervical spine, shoulder, and elbow was justified. The evidence clearly shows that Claimant suffered a temporary total disability beginning 26 June 2001.

[172] CX-16, p. 32.
[173] Id. at 31.
[174] EX-8 (surveillance taken on 16-17 February 2005 showed Claimant lifting and carrying paint canisters and ladders).
[175] CX-11, pp. 1-2.

Since Claimant established he could not return to his original job, the burden shifted to Employer to establish suitable alternative employment. Taking the restrictions placed upon Claimant by Dr. Acevedo, Claimant was limited to light duty work and could not grasp, squeeze, flex, or extend his left arm until 22 August 2001.[176] Mr. Rodriguez testified that light duty work was available on 18 June 2001 when Dr. Acevedo placed the restrictions on Claimant. He further testified had he known of those restrictions, he would have placed Claimant in a position satisfying them.

According to Mr. Rodriguez, Claimant never informed him that he was released to light duty with restrictions. Claimant received a work release on 18 June 2001 from U.S. Healthworks, but never provided it to Employer. Mr. Rodriguez further testified that had Claimant provided him with the work release, he would have placed him in a light duty position. Had Claimant returned to work for Employer, he would have been paid the same amount he was paid prior to his injury.[177] Claimant just stopped going to work. Employer argued that in essence, he abandoned his work position and never gave it an opportunity to provide him light duty work.

Although not fully briefed, there was a possible argument that the light duty work described by Mr. Rodriguez could be considered sheltered employment. However, the work duties described by Mr. Rodriguez are essential to the operations of the dredge and its welders. It was sufficient that Employer offered Claimant a position in its own facility since it was not sheltered employment.[178] As Mr. Rodriguez testified "housekeeping is a job itself."[179] Claimant could have done maintenance work, paint and clean the dredge, and make coffee. This would have been a meaningful job that was necessary to the function of the dredge. Employer always has at least two people working in this position and it is a "never-ending job."

Although Employer had light duty work available for Claimant as of 18 June 2001, Dr. Crawford took Claimant off of work entirely on 26 June 2001 until 21 February 2002. All of Claimant's treating physicians agreed with the conservative care Dr. Crawford provided to Claimant and never questioned Claimant's no-work status. As of 21 February 2002, Claimant was released to light duty work with restrictions expected to last through 21 March 2002. Mr. Rodriguez testified that at any point since 18 June 2001, Claimant could have come back to work for Employer at light duty. Since Claimant was released to light duty work with restrictions on 21 February 2002 and Employer had light duty work available at that time, Employer has established suitable alternative employment in the form of its own employment, which paid the same as Claimant earned prior to his date of injury. As such, Employer has carried its burden that suitable alternative employment was available as of 21 February 2002.

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[176] CX-11, pp. 1-2.
[177] Tr. 197.
[178] Darby, 99 F.3d 685; Darden, 18 BRBS 224.
[179] Tr. 212.

Based on the record, I find Claimant suffered from temporary total disability from 26 June 2001 through 21 February 2002,[180] at which time Employer established suitable alternative employment at a pay rate equal to his average weekly wage.

Average Weekly Wage

The evidence shows Claimant began working for Employer around 11 October 2000. He initially earned $8.00 per hour, but around December 2000 was promoted to a welder's helper position and earned $10.00 per hour. He worked on average six or seven days per week. Claimant did not work for the same employer for the preceding one year prior to his injury.

Claimant worked for Employer for 34 2/7 weeks (or 240 days) for the Employer in the year prior to his injury, which may be considered "substantially all of the year" as required for a calculation under subsection 10(a) and 10(b).[181] However, since the parties agree that 10(c) is the appropriate standard under which to calculate Claimant's average weekly wage and Claimant is neither a six nor five-day worker, this Court shall use subsection 10(c) to fairly and reasonably calculate Claimant's average weekly wage.

In 2001, Claimant worked for Employer and earned $19,335.00.[182] $105.00 of this total was earned after 8 June 2001.[183] The relevant earnings from Employer in 2001 total $19,230.00.[184] Claimant also earned $7,034.00 while working for Employer in 2000.[185] Claimant originally drove dump trucks for Employer until his promotion to a welder's helper in December 2000. Prior to working for Employer, Claimant worked as a painter for Robert's Painting. This Court only considered Claimant's earnings from Employer in calculating his average weekly wage.

Claimant earned $26,264.00 while working for Employer. He worked for Employer for 34 2/7 weeks (or 240 days) prior to his work injury. This yields an average weekly wage of $766.03.

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[180] CX-16, p. 31 (Dr. Crawford returned Claimant to work at light duty with restrictions expected to last through 21 March 2002).

[181] See Lozupone v. Stephano Lozupone & Sons, 12 BRBS 148 (1979) (33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979) (36 weeks is not substantially all of the year); cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990) (34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

[182] CX-3, p. 8.

[183] CX-5, p. 2.

[184] A deduction of $105.00 was applied since it was earned after Claimant's date of injury 8 June 2001.

[185] CX-3, p. 16.

Penalties

In the present matter, there is no evidence that Employer or Carrier filed a notice of controversion. Carrier's representative testified that no controversion in the case was filed.[186] Claimant became entitled to continued benefits on 26 June 2001. In accordance with section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[187] Thus, Employer was liable for Claimant's permanent total disability compensation payment on 10 July 2001.

Because Employer did not controvert Claimant's right to compensation, Employer was not entitled to an additional fourteen days within which to file with the District Director a notice of controversion.[188] A notice of controversion should have been filed by 24 July 2001 to be timely and prevent the application of penalties. Since Employer did not file a notice of controversion and the informal conference was held on 14 January 2003, penalties will accrue the entire period Claimant is entitled to compensation. Accordingly, Claimant is entitled to penalties from 26 June 2001 through 21 February 2002.

ORDER AND DECISION

1. Claimant's claim for disability benefits and compensation is granted in part. Employer shall pay Claimant temporary total disability compensation from 26 June 2001 through 21 February 2002, based on an average weekly wage of $766.03.

2. Employer shall pay penalties on the above amounts in accordance with Section 14(e).

3. Claimant has not yet reached MMI.

4. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's left arm injury, pursuant to the provisions of Section 7 of the Act. This includes the surgery recommended by Claimant's treating physician. It does not include treatment by Dr. Mark Crawford.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

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[186] Tr. 227 (on 3 July 2001, a Notice of Disputed Claim was filed regarding Claimant's Texas Workers' Compensation claim only. The notice specifically denied compensation and liability in its entirety because Claimant "is a Longshore employee not covered" under the Texas Workers' Compensation policy).

[187] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen (14) days.

[188] Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981) (cut-off date for penalties can be the date of informal conference).

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[189]

7. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

8. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[190] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge

[189] Effective 27 February 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of servie of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

[190] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **29 July 2004**, the date this matter was referred from the District Director.